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REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF OREGON.

ROBERT G. MORROW,
REPORTER.

VOLUME XXXI.

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CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

OREGON.

[Argued April 18; Decided April 19, 1897.]

LITTLE NESTUCCA ROAD COMPANY v. TILLAMOOK COUNTY.

(48 Pac. 465.)

31	1
34	354

EMINENT DOMAIN—PROPERTY ALREADY IN PUBLIC USE.—While it is true that property already appropriated to public use may be again seized for a different purpose of the same kind, yet this can be done only by an express provision of statute, or by necessary implication.

COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE.—Where a person or corporation in whose behalf private property has been taken under the right of eminent domain has acquired an interest by reason of money or improvements expended on such property, compensation must be made for such interest before the property thereby affected can be appropriated to a new public use.

LOCATING PUBLIC HIGHWAY ON EXISTING TOLL ROAD.—Under the general power to lay out and establish public highways (Hill's Ann. Laws, § 4061 *et seq.*) a county court cannot locate a highway over land previously appropriated for a toll road, without rendering compensation according to law for the property: Sections 3255–3257, cited.

STATUTORY CONSTRUCTION—ROAD NOTICE.—The proceeding provided by section 3256 of Hill's Ann. Laws for appropriating to public use the property of a toll road company is a hostile one, and the petition and notice required by section 4062 for locating a county road must be given as in ordinary cases.

APPROPRIATION OF TOLL ROAD—PAYMENT OF COMPENSATION.—Before a county court can appropriate a toll road to the use of the public it must pay the compensation provided by law: Section 3258, Hill's Ann. Laws.

PLEADING—ANTICIPATING DEFENSE.—In pleading under the code system it is not necessary or appropriate to anticipate a possible defense; thus, in a suit against a county to enjoin an alleged unlawful appropriation of plaintiff's toll road, the complaint need not aver defendant's failure to pay plaintiff the amount prescribed by statute as a condition precedent to the appropriation. Such payment is a matter of defense.

From Tillamook: HENRY H. HEWITT, Judge.

Suit by the Little Nestucca Toll Road Company against Tillamook County and another to restrain a threatened trespass on plaintiff's toll road. A demurrer to the complaint was sustained, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Thayer* and *McCoy*, *W. J. May* and *Claude Thayer*, with an oral argument by *Messrs. William W. Thayer* and *W. J. May*.

For respondent there was a brief over the names of *Samuel Hayden*, district attorney, *E. E. Selph* and *T. G. Handley*, with an oral argument by *Mr. Cicero Milton Idleman*, attorney-general.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a suit to enjoin a threatened trespass. The plaintiff alleges, in substance, that, having been duly incorporated for that purpose, it built at great expense, and for more than ten years last past has been the owner of, and expended large sums of

money in maintaining, the sixty foot toll road extending from the eastern boundary of said county through the town of Dolph, thence westerly along the banks of the Little Nestucca River to the Pacific Ocean, and that under the laws of this state it is entitled to demand and has been collecting tolls for travel thereon, which have been and are of great value; that, D. P. Harvey and others having petitioned therefor, the county court appointed viewers and a surveyor, who viewed and surveyed a proposed county road, as prayed for in the petition, directly along and upon plaintiff's toll road, and, the report of the viewers being favorable, the said court, on July 3, 1895, having awarded to one Wm. Baxter the sum of \$25 damages on account of the opening of said road, made a pretended order that said report and the plat of the survey be recorded, and thereupon declared the line of road so viewed and surveyed a public highway, and directed the defendant, George E. Mizner, as road supervisor to open the same; that these proceedings and the pretended orders of said court are null and void, notwithstanding which Mizner threatens to and will, unless restrained, tear down and remove the gates from plaintiff's toll road, and trespass upon its property; that this pretended county road, if allowed to be opened to public travel, would be a virtual appropriation of the said toll road, a nullification of plaintiff's charter, and a destruction of its franchise, and if the orders of the said court are permitted to be executed and the threats of Mizner to be performed, they will result in irreparable injury to the plaintiff, for which it has no adequate remedy at law, and

prays for a perpetual injunction to prevent the threatened mischief. A demurrer was sustained to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of suit.

Counsel for the plaintiff contend that the decision of the court was predicated upon the assumption that the county court had authority to lay out a public road directly upon the ground used and occupied by their client for its toll road. The statute authorizes a corporation organized for the construction of any macadamized, plank, or clay road to appropriate so much of any land between the termini thereof as may be necessary for its use, not exceeding sixty feet in width, and when such road is completed and fit for travel, the corporation, by giving notice thereof, has the power to make it a public highway, and upon placing gates thereon, may collect such toll as may be prescribed by the county court of the county where such road is located: Hill's Ann. Laws, §§ 3239-3249. Such a corporation is required to keep an accurate account of the moneys expended in the construction and repair of its road, including any sum paid for lands appropriated, and also to keep a like account of the tolls received and other profits, which shall be verified by the oath of its president or one of its directors, and a copy thereof deposited with the county clerk with whom the articles of incorporation are filed; and at any time after the expiration of ten years from the time of taking such tolls, it shall be lawful for the county court of any county through which the road shall pass to pay such corporation the amount of money so expended by it, and interest thereon, after

deducting the amount of tolls and other profits received by it, and thereupon the said toll road shall become the property of such county: Hill's Ann. Laws, §§ 3255-6. If the right of the county court to appropriate the plaintiff's property be based upon the general provisions of the statute relating to the method of laying out, altering, or locating county roads (§ 4061 *et seq.*) it must be admitted that the decree complained of is erroneous. Judge Elliott, in his work on Roads and Streets, in discussing this question, says: "The right of eminent domain is a dominant legislative power only called into exercise by the enactment of a valid statute, and when a party asserts a right to seize land previously appropriated to a public use, he must sustain his claim by producing a statute clearly conferring the asserted authority. It will not be presumed, in the absence of such a statute, that the legislature intended to again seize property which had been once appropriated. An act providing for the laying out of a road or street, and the assessment of benefits and damages in favor of and against landowners, will not authorize the appropriation of lands already used for public parks. Nor will an act of such a character warrant the seizure of land previously appropriated for a turn-pike." The statute prescribes the method and makes ample provisions for laying out a county road and assessing the damage resulting to those persons upon whose lands it may be established; but no provision is made in the general act upon this subject whereby a county road can be located over land already appropriated to a public use: Hill's Ann. Laws, §§ 4061-4104. The ap-

appropriation of land to a public use is an exercise of the sovereign power, which the state may delegate to a municipal or private corporation, and land already appropriated and used by its trustee, under the authority delegated, may be taken by legislative enactment for other public uses, in which case it is always presumed that the new use is of more importance and greater value to the public than the original appropriation: *Mills on Eminent Domain*, § 45; *Baltimore R. R. Co. v. North*, 103 Ind. 486 (3 N. E. 144). It is a rule, however, of universal application that the subsequent delegation of power to appropriate land which has once been appropriated must be in express terms, or must arise from necessary implication: *Boston Water Power Co. v. Boston R. R. Corporation*, 23 Pick. 360; *Proprietors of Locks v. City of Lowell*, 7 Gray, 223; *Boston v. Lowell R. R. Co.*, 124 Mass. 368; *Providence R. R. Co. v. Norwich R. R. Co.*, 138 Mass. 277; *Hickok v. Hine*, 23 Ohio St. 523 (13 Am. Rep. 255); *State, etc. v. Montclair Ry. Co.*, 35 N. J. Law, 328; *New Jersey R. R. Co. v. Long Branch Commissioners*, 39 N. J. Law, 28; *In re City of Buffalo*, 68 N. Y. 167.

The right of the state to appropriate to a new use property which has already been subjected by a municipal or private corporation to a public burden must rest upon the authority of the state to change at pleasure its trustees and the object of its trust; but when the trustee has an interest by reason of money expended in the purchase of the right of way, or in improvements made upon the property, under the power delegated, the state must provide a method of compensation for such interest before the property

affected thereby can be appropriated to a new use. The legislative assembly has, by statute, provided a method of acquiring the toll roads of such corporations, and prescribed the compensation to be paid for their interests on re-appropriation by the county (Hill's Ann. Laws, §§ 3239-3257), and the plaintiff, in acquiring its property, took the same with notice that its toll road might be converted into a county road.

Counsel for the defendant insist that as the only method prescribed for acquiring the road in question was by payment of the cost of its construction, etc., under the terms prescribed by the statute, it must be presumed that the county court paid the amount of money required therefor of it, and, as this presumption is not negatived by the allegations of the complaint, the court properly sustained the demurrer. The county court of each county exercises supervision over all roads within its borders, and all applications for laying out, altering or locating county roads shall be by petition to the county court of the proper county: Hill's Ann. Laws, §§ 4061, 4062. Section 3256 of the Code does not make a petition to the county a prerequisite to the exercise of the right to appropriate the road of a private corporation, but, after the corporation has enjoyed the privilege of collecting tolls for a period of more than ten years, a proceeding to appropriate its property by the county court may be instituted; and, as such method must necessarily be a transaction *in invitum*, it would seem to follow that section 3256 should be construed *in pari materia* with section 4062, in which case a petition and notice of some kind, at least, are requisite to confer upon the

county court jurisdiction to appropriate the toll-road of a private corporation within its territory.

The complaint alleges that upon the petition of D. P. Harvey and others the county court of Tillamook County made a pretended order establishing a county road directly along and upon plaintiff's said toll road, but the pleading does not state that any notice of the application was ever given, or that any sum was ever paid to the plaintiff as a compensation for the loss of its property and franchise. It is true the complaint alleges that the sum of \$25 was awarded to one William Baxter as damages, etc., but it does not appear that there was any privity between this person and the plaintiff. If the want of notice be deemed immaterial, the payment of the amount prescribed by the statute (section 3256, Hill's Ann. Laws) is certainly a condition precedent to the right of the county court to appropriate this toll road, and this presents the question whether the complaint should have alleged a neglect in this respect. The rule is general that the plaintiff is under no legal obligation to the adverse party to advise him of the defense he should interpose, and under this rule the complaint in code pleading ought not to anticipate or negative a possible defense (Boone on Code Pleading, § 11; Bliss on Code Pleading, § 200; 4 Ency. Pl. and Prac., 614), and a condition which qualifies or defeats the plaintiff's suit, being a condition subsequent, may be safely ignored by him in the pleading: 4 Ency. Pl. and Prac., 628. A statement of these facts, which might be deemed a condition subsequent as to plaintiff's right of suit, must be considered a condition precedent to the de-

defendant's right of appropriation, and under the rules hereinbefore announced it would seem to be the duty of the latter to plead the statute and the performance of its conditions as a foundation for its defense. The plaintiff was under no legal obligation to set out these facts in its complaint, an examination of which leaves us in doubt as to whether the alleged attempt of the county court to acquire this property was made under the general statute or by virtue of the special provisions for the appropriation of toll roads; but in any event we think it was the duty of the defendant to raise this question by answer. The demurrer must therefore be overruled, the decree reversed, and the cause remanded for such further proceedings as may be deemed just and proper, not inconsistent with this opinion.

REVERSED.

[Argued April 19; decided May 1, 1897; rehearing denied.]

WASON v. PILZ.

(48 Pac. 701.)

EASEMENT—TERMS OF GRANT.—A deed conveying a certain strip of land "for road purposes. * * * The said strip so conveyed for a road as above stated," etc., indicates only an easement in the property described.

From Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by Mary Isabella Wason against Robert Pilz and Annie C. Schmeer, to quiet the title to a small tract of land twenty by two hundred feet, situate in Multnomah County, and now within the corporate limits of the City of Portland. On July 31,

1876, John Schmeer, Sr., who was then the owner thereof in fee simple, executed and delivered to Peter Schmeer a deed granting an estate therein, described as follows: "A parcel of land, for the purposes of a road, twenty feet wide, across the center, running east and west over and across the following described real estate: [Describing it.] The said strip of twenty feet, so herein conveyed for a road as above stated, is to be inclosed by a good, substantial board fence by the said Peter Schmeer, and kept in repair by him." On October 29, 1880, Peter Schmeer deeded the estate thus acquired to Rudolph Schmeer, but Rudolph did not record his deed until March 18, 1881. On November 30, 1880, Peter Schmeer was convicted in the circuit court for said county of an assault, and on December 2, was sentenced to pay a fine of \$200 and costs, and judgment was entered accordingly. The premises in question, or the estate of Peter Schmeer therein, was sold under execution to satisfy this judgment, and was purchased by Thomas and Ellen Uglow who afterwards, on November 11, 1881, obtained a deed from the sheriff. On November 17, 1881, Thomas and Ellen Uglow conveyed an undivided one-half interest to H. H. Northup. On December 31, 1881, in a suit then pending, touching the title, wherein H. H. Northup was plaintiff, and Rudolph Schmeer and wife were defendants, and which was commenced November 19 prior, it was decreed that Northup was the owner in fee and entitled to the possession of an undivided one-half of the premises, and that Thomas and Ellen Uglow were the owners of the remaining half. The plaintiff derails title through Northup

and the Uglows. In 1882, John Schmeer, Sr., died, leaving a will, by which he devised to the defendant Annie C. Schmeer the undivided one-half of a six-acre tract of land, which, by its description, covers the premises in question, and to John Schmeer, Jr., and Sophia Kirchoff, the remaining half. On April 13, 1884, John Schmeer, Jr., and Sophia Kirchoff executed to Annie C. Schmeer a deed to the south half of said tract described in the will; and on July 20, 1887, John Schmeer, Jr., and Sophia Kirchoff obtained a decree against Annie C. Schmeer for the north half,—the dividing line running lengthwise through the center of the premises in dispute. On February 12, 1886, Rudolph Schmeer executed a deed to Annie C. Schmeer, covering the interest conveyed to him by Peter Schmeer. On June 7, 1888, John Schmeer, Jr., and Sophia Kirchoff executed a deed to Rudolph Schmeer, covering the north ten feet, or one-half of the premises in dispute; and on July 20, 1889, Rudolph deeded to defendant Robert Pilz by the same description. The defendant Annie C. Schmeer, by her answer, claims ownership in fee of the disputed premises, except that portion occupied by a brick building seventeen by thirty-five feet. The defendant Robert Pilz filed a disclaimer of all interest in the premises. A decree having been entered for plaintiff, Annie C. Schmeer appeals.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. William York Masters*.

For respondent there was a brief and an oral argument by *Mr. George Wintermute Hazen*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

By the record, the defendant Schmeer can claim no interest whatever in the north half of the premises, as the decree of July 20, 1887, precludes her in favor of John Schmeer, Jr., and Sophia Kirchoff, and this decree is later than the deed from Rudolph Schmeer to her. Subsequent to the date of this decree, John Schmeer, Jr., and Sophia Kirchoff gave a deed to Rudolph to said north half, and a little later he deeded to the defendant Robert Pilz, who now disclaims all interest in the premises; so that, as it concerns the north half, the plaintiff must be held to be the owner in fee simple, unless the defendant Annie C. Schmeer has obtained title by adverse possession. As it pertains to the south half, the decree of the court of December 31, 1881, in the case of Northup against Rudolph Schmeer and wife, precludes her in so far as she may claim title through Rudolph. The deed brings her into privity with him, and, having been executed subsequent to the decree, leaves the decree as effective against her as it is against him. But in so far as she may claim through devise from John Schmeer, Sr., and through deed from John Schmeer, Jr., and Sophia Kirchoff, she is not thus precluded. This claim is by independent title, coming direct from the source of Rudolph Schmeer's title, and the question comes to this: Which of these is the better title,

assuming that the plaintiff has the Rudolph title? The deed from John Schmeer to Peter Schmeer, under which Rudolph claimed, conveys only an easement. The description is: "A parcel of land for road purposes. * * * The said strip of twenty feet so herein conveyed for a road as above stated is to be inclosed," etc. Language of similar import was held in *Robinson v. Railroad Company*, 59 Vt. 426, (10 Atl. 522) to create an easement. In that case the estate was described as "a strip of land four rods in width, across my land, and being the same land now occupied by the St. Albans and Richford Plank Road Company for their road, for the use of a plank road." The words "for the use of a plank road" seem to have been decisive of the estate carved out, although the deed otherwise purported to be an absolute grant. See, also, *Sanborn v. City of Minneapolis* (Minn.) 29 N. W. 126. So, in this case, the words "a parcel of land for road purposes" are indicative of an easement only, and are controlling as the measure of the estate granted; but the title which Annie C. Schmeer obtains through the devise is a fee-simple title. We have been unable, after a very careful consideration of the testimony, to find that either party has made out a title by adverse possession, except as it concerns the occupancy of the brick building. So we conclude that the plaintiff is the owner in fee simple of the north half of the premises in dispute, and also all that portion of the south half which is covered by said building; that she is the owner of an easement in the remaining portion of the south half for road purposes, and to that end is entitled to possession; but that the

defendant Annie C. Schmeer is the owner of such remaining portion of the said south half in fee simple, subject, however, to such easement. The decree of the court below will therefore be modified in accordance with these conclusions, neither party to recover costs on the appeal.

MODIFIED.

[Argued December 30, 1896; decided March 16, 1897.]

WEAVER v. SOUTHERN OREGON COMPANY.

(48 Pac. 167.)

1. LANDLORD AND TENANT.—The relation of landlord and tenant arises where one, by consent of the landlord, goes into possession of leased land as the successor in interest of the tenant, and while thus occupying the land pays rent at the rate stipulated in the lease, and continues to so occupy the premises after the expiration of the term, all with the consent of the landlord.
2. ACCEPTANCE OF DEED.—A deed poll, when accepted by the grantee, becomes the mutual act of the parties, and its terms may be enforced.

From Coos: J. C. FULLERTON, Judge.

This action was commenced in October, 1894, to recover for the use and occupation by the defendant of certain premises belonging to the plaintiff. The complaint contains two causes of action, in the first of which it is, in substance, alleged that on the twenty-fourth day of July, 1882, by a certain agreement or lease in writing, a copy of which is annexed to and made part of the complaint, the plaintiff demised to one H. H. Luse a right of way for a logging tramway or railroal over certain premises belonging to him for the term of ten years at an annual rental of \$125, payable at the end of each year; that on or about the fourteenth day of December, 1887, all the rights of Luse under the lease became vested in the defendant, as his

successor in interest, and it then and there, with the consent of plaintiff, "entered into possession of said demised premises, and, with consent of plaintiff, continued in possession of said premises during the full period of said lease; and, since the expiration of the ten years' term described and provided for in said lease, defendant, with consent of plaintiff, has continued in the possession of said premises, and, with consent of plaintiff, still continues in possession thereof, and still continues to use and occupy the same for its logging railroad, and for its logging purposes; and during said time that defendant was so possessed of said demised premises it continued to pay said yearly rental of \$125 per year up to the thirty-first day of December, 1892; that since said thirty-first day of December, 1892, defendant refuses to pay any rent for the use of said premises, and there is now due and owing plaintiff from defendant on said agreement of lease, and for the use and occupation of said premises for said right of way, the sum of \$125 for the year's rent commencing January 1, 1893, and ending December 31, 1893, and interest on said sum of \$125 at the rate of 8 per cent. per annum since said thirty-first day of December, 1893, and defendant has not paid the same nor any part thereof."

As a further and separate cause of action, it is alleged, in substance, that on July 12, 1890, the plaintiff sold and by deed conveyed to the defendant all the timber, except red cedar, standing, lying, or being on certain described real property belonging to him, together with the right and privilege of entering upon said real property and making such roads and ways

thereon as it might deem suitable and convenient for the removal of such timber, at any time within three years; and stipulated therein that in case the defendant should fail to complete the removal thereof within the time specified, it should have such additional time as it might desire in which to do so by paying at the rate of \$100 per year therefor; that defendant accepted said deed, and agreed to comply with its stipulations and conditions, but failed to remove the timber within the time specified, and has since "exercised and enjoyed the granted rights and privileges of entering said land for the purpose of removing its said timber, and is now engaged in removing said timber from said land; that there is now due and owing plaintiff from defendant under the terms and conditions contained in said deed upon which the grant of said timber was made, and under said agreement, and for the use and occupation of said land, and for the exercise and enjoyment of said granted rights and privileges mentioned in the conditions contained in said deed, the sum of \$100 for the year commencing July 13, 1893, and ending July 12, 1894, and interest thereon at the rate of 8 per cent. per annum since said twelfth day of July, 1894." The complaint then concludes with a prayer for judgment. The defendant demurred to each separate cause of action on the ground that it did not contain facts sufficient to constitute a cause of action, which being overruled, it refused to answer or plead further, and judgment was entered against it for the amount prayed for in the complaint, from which this appeal is taken.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. J. W. Hamilton*.

For respondent there was a brief and an oral argument by *Mr. A. J. Sherwood*.

Mr. Justice BEAN, after stating the facts, delivered the opinion of the court.

1. The contention for the defendant seems to be that the statement of the first cause of action is insufficient because it does not show a liability on the part of the defendant under the terms and conditions of the lease from the plaintiff to Luse. But we do not understand this to be an action on the lease, but for use and occupation of the premises by the defendant, with plaintiff's consent, after the expiration of such lease, and that the allegations concerning the lease to Luse were intended as a mere matter of inducement for the purpose of showing the circumstances under which defendant came into possession of the premises. The complaint, no doubt, contains much unnecessary matter, but it is averred, substantially, that defendant entered into possession and occupied the premises by consent of the plaintiff, as the successor in interest of Luse, and while so occupying paid the rent therefor at the rate stipulated in the lease during the term, and that after the expiration of the term it continued to so occupy and use the premises as a tenant by and with the consent of plaintiff. These facts, if true, establish the relation of landlord and tenant between the plaintiff and defendant, so as

to entitle the plaintiff to recover for the use and occupation of the premises, and the lease in question is admissible to fix the amount of rent: 1 Taylor on Landlord and Tenant, §§ 19 and 22; Wood on Landlord and Tenant, § 552.

2. The objection to the statement of the second cause of action is that it appears therefrom that the deed containing the stipulations upon which the action is founded was not signed by the defendant. But the rule is well settled that a deed-poll, when accepted by the grantee, becomes the mutual act of the parties; and a stipulation therein to be performed by the grantee becomes, by force of such acceptance, a valid contract on his part upon which an action may be maintained: 1 Taylor's Landlord and Tenant, § 147; *Goodwin v. Gilbert*, 9 Mass. 510; *Newell v. Hill*, 2 Met. (Mass.) 180. It is clear, therefore, that an action lies for the rent reserved in the deed from the plaintiff to the defendant, although not signed by the latter.

It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

[Argued April 7; decided May 1, 1897.]

FLAGG v. MARION COUNTY.

(48 Pac. 698.)

IMPLIED POWER OF AGENT—MUNICIPAL OFFICERS.—Delegation of authority to an agent implies the power to do all things necessary, proper, usual, and reasonable in order to effectuate the purpose of the agency, and this rule is applicable to the agents and officers of municipal corporations as well as to the agents of private individuals.

AUTHORITY OF COUNTY CLERK TO CONTRACT FOR PRINTING BALLOTS.—The power expressly conferred on the county clerk by section 47 of the statute commonly known as the "Australian Ballot Law" (Laws 1891,

pp. 14, 23) to cause the official ballots to be printed, implies the power to bind the county by a contract for such printing, subject to the limitation that the price agreed to be paid must be reasonable.

PRESUMPTION OF REASONABLENESS OF PUBLIC CONTRACT.—A contract entered into by a county clerk under the power conferred upon him by section 47 of the "Australian Ballot Law" (Laws 1891, p. 23) to cause official ballots to be printed must, in the absence of an affirmative showing to the contrary, be regarded as reasonable and valid.

CLAIM AGAINST COUNTY.—The mere acceptance of a portion of a claim presented to a county is insufficient to create a presumption that the payment was either made or accepted in full of the claim, within the rule that if a claim presented to a county is allowed in part and rejected as to the residue, and the claimant, knowing of such action, accepts the amount allowed, such acceptance will be considered a satisfaction of the whole.

From Marion: GEORGE H. BURNETT, Judge.

Action by the firm of Flagg & Cronise against Marion County to recover the contract price of printing certain election ballots. A demurrer to the complaint was sustained, and plaintiffs appeal.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. William H. Holmes*.

For respondent there was a brief and an oral argument by *Messrs. Samuel L. Hayden*, district attorney, and *George G. Bingham*.

Opinion by MR. JUSTICE BEAN.

This is an action against Marion County to recover a balance of \$290, alleged to be due the plaintiffs for printing election ballots. The plaintiffs allege in their complaint that in May, 1894, they were employed

by the clerk of the defendant county to print sixty thousand election ballots, for the agreed and stipulated sum of \$700; that they duly performed their contract, and presented a bill for the sum stipulated to the county court for payment, but that the same has not been paid, or any part thereof, except the sum of \$410, and judgment is demanded for the balance. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, was sustained. The argument in support of the ruling of the court below is (1) that while a county clerk may, under the law, contract for the printing of election ballots, he has no authority to bind the county by an agreement as to the price to be paid therefor, and hence this action should have been on a *quantum meruit*, and not for an agreed compensation; and (2) that plaintiffs are estopped from maintaining the action.

By section 47 of what is commonly known as the "Australian Ballot Law" (Laws of 1891, p. 23) it is provided that "the county clerk of each county shall cause to be printed according to law all the ballots required under the provisions of this act, and shall furnish the same in the manner hereinafter provided for the use of all electors in the county," and section 20 (Laws of 1891, p. 14) provides that "each county court shall audit and pay out of the county treasury such fees as the services performed by the county clerk and the sheriff, under this act, are, in the judgment of the county court, reasonably worth; also such other necessary expenses as are incurred by such officers in carrying out the provisions of this

act." It thus appears that the county clerk is required to provide the requisite number of election ballots, and the county court to pay the necessary expenses incurred by him in so doing. By the law the clerk is made the sole agent of the county for the purpose designated, and therefore has implied authority to make whatever contract or contracts may reasonably be necessary to enable him to perform the duty required of him. The rule is everywhere recognized that every delegation of authority to an agent carries with it the power to do all things which are necessary, proper, usual, and reasonable to be done in order to effectuate the purpose for which the agency was created. Thus, it is held that power conferred upon a committee to employ experts and investigate the affairs of a corporation implies the right to agree upon the compensation to be paid to the experts employed by it: *Star Line v. Van Vliet*, 43 Mich. 364 (5 N. W. 418). The same principle is laid down by Mr. Mechem in his work on Agency (§ 311), and by Judge Story in his work on the same subject: § 58. And it is believed this doctrine is applicable to the agents and officers of municipal corporations, as well as to the agents of private individuals, unless their powers are otherwise limited or restricted by some provision of law. Within this principle, the contract in suit is clearly valid. The power to cause the ballots to be printed necessarily implies the right to agree with the person employed by him to perform the work as to the rate of compensation. Without this power it would be difficult, if not impossible, for him to perform the duty required. It is very doubtful whether

persons could be found willing to provide the labor and incur the expense necessary to print the large number of ballots required in many counties of the state without some understanding as to their compensation. In making a contract for the printing of ballots the county clerk of course acts in a public capacity, and cannot bind the county to pay an unreasonable sum for the services rendered; for such a contract, like all similar contracts by public officers, would be against public policy and void: *County of Chester v. Barber*, 97 Pa. St. 455. But the contract as made by him must, in the absence of an affirmative showing to the contrary, be regarded as reasonable and valid, and it is sufficient to support an action against the county for the agreed compensation.

It is next claimed that the plaintiffs are estopped from maintaining this action because they have accepted a part payment on their claim, and several authorities are cited to the effect that where one who has a claim against a county presents it to the county court for allowance, and it is allowed in part, and rejected as to the residue, and the claimant, knowing of such action, accepts the amount allowed, such acceptance will be considered satisfaction of the whole: *Brick v. Plymouth County*, 63 Iowa 462 (19 N. W. 304); *Board of Commissioners v. Seawell*, 3 Okl. 281 (41 Pac. 592). But the allegations of the complaint do not bring the cause within this rule; it simply avers that the claim was presented to the county court for payment, and that subsequently the sum of \$410 was paid thereon. This is not sufficient under the rule contended for to create a presumption that the payment was either

made or accepted in full of the claim: *Fulton v. Monona County*, 47 Iowa 622. The judgment of the court below is therefore reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

[Argued December 31, 1896; decided May 1, 1897.]

MEYER v. EDWARDS.

(48 Pac. 696.)

AMENDING PLEADINGS ON APPEAL FROM JUSTICE'S COURT—CONSTRUCTION OF STATUTE.—The amendment of 1893 (Laws 1893, p. 38), which repeals the provision of the Justice's Code, c. 9, § 80, limiting amendments in the circuit court on appeal to such as did not substantially change the issues in the justice's court, provides that no formal or written pleadings shall be required in justice's courts; that the pleadings may be either oral or in writing; and that "the bill of items of the account sued on or filed as a counterclaim or set-off, or the statement of the plaintiff's cause of action or of the defendant's counterclaim or set-off or other ground of defense filed before the justice, may be amended upon appeal in the appellate court to supply any defect, deficiency, or omission therein by filing formal pleadings therein, when by such amendment substantial justice will be promoted,"—the only limitation in terms being that "no new item or cause of action not embraced or intended to be included in the original account or statement" shall be added by amendment. *Held*, that the right of amendment is not limited to cases in which the pleadings were oral, nor to such amendments as will not change the issues, but that a defendant may, by leave of court, on appeal, file an amended answer, raising a defense which he omitted to plead in the court below, when substantial justice will be thereby promoted: *Waggy v. Scott*, 29 Or. 386, distinguished.

MR. CHIEF JUSTICE MOORE, dissents.

From Multnomah: E. D. SHATTUCK, Judge.

Action at law by the firm of Meyer & Strom against H. E. Edwards. Plaintiffs had a judgment, hence this appeal.

REVERSED.

31	23
334	322
34	274

For appellant there was a brief over the names of *Martin L. Pipes* and *Clarence W. Avery*, with an oral argument by *Mr. Pipes*.

For respondents there was a brief over the name of *McGinn, Sears* and *Simon*, with an oral argument by *Mr. Nathan D. Simon*.

Opinion by MR. JUSTICE BEAN.

This is an action commenced in a justice's court for rent of certain premises in the City of Portland, alleged to have been leased by plaintiffs to the defendant. The complaint is in the usual form, and the answer consists of specific denials of the allegations thereof. The trial in the justice's court resulting in a judgment for plaintiffs, the defendant appealed to the circuit court, and there moved for permission to amend his answer by adding thereto an affirmative defense to the effect that the premises were leased by plaintiffs to one May Hastings as a bawdy-house, and that defendant executed the lease for her as surety only; that as soon as he was informed of the character of the agreement between the plaintiffs and said Hastings, and the purpose for which the building was being used, he refused further to be bound by his contract, and immediately notified the plaintiffs to that effect; but the court overruled the motion on the ground that the amendment would substantially change the issues tried in the court below, and this ruling is the only assignment of error necessary to consider at this time. No question is made as to the sufficiency of the facts pleaded in the proposed

amended answer to constitute a defense to the action, or of the propriety of the amendment, if it can lawfully be made; but the contention for the plaintiffs is that under the justice's act of 1893 (Laws 1893, p. 38), only oral or informal pleadings in a justice's court can be amended in the circuit court on appeal, and that no new defense can be introduced by such amendment. This is, in our opinion, too narrow and technical a construction of the act referred to. It is obviously designed, as its title implies, to simplify proceedings in justice's courts, and to remedy what was regarded as a serious defect in the old law, which limited amendments by the appellate court to such as did not substantially change the issues tried in the court below: Chapter 9, § 80, of the Justice's Code. The section containing this limitation on the power of the circuit court to permit amendments of pleadings in cases brought to that court by appeal from justice's courts was expressly repealed by the act of 1893, and in lieu thereof it is provided that in all cases on appeal "the bill of items of the account sued on or filed as a counterclaim or set-off, or the statement of the plaintiff's cause of action or of the defendant's counterclaim or set-off, or other ground of defense filed before the justice, may be amended upon appeal in the appellate court to supply any defect, deficiency, or omission therein by filing formal pleadings therein, when by such amendment substantial justice will be promoted." The only limitation upon this power to be found in the law is the latter clause of section 7, to the effect that "no new item or cause of action not embraced or intended to be included in

the original account or statement" shall be added by amendment. The conclusion is therefore irresistible that the legislature intended by the act of 1893, to enlarge the powers of the circuit court in the matter of amendments to such pleadings. And in view of these considerations, it should be construed liberally for the suppression of the mischief sought to be obviated, and the advancement of the remedy intended.

It will be observed that the statute not only provides that the bill of items of the account sued on or filed as a counterclaim or set-off may be amended; but that the statement of plaintiff's cause of action or of the defendant's counterclaim or other ground of defense may also be amended; and this is certainly broad enough to include any pleading coming from a justice's court. Indeed, under our procedure, the most formal written pleading is nothing more than a plain and concise statement of plaintiff's cause of action, or of defendant's ground of defense, and hence it is clear that the legislature did not intend by this statute to make any distinction in the right of amendment based on the mere form of the pleading. In construing the statute, it must be borne in mind that it is remedial in its nature, and that the old law, the mischief, and the remedy provided, must be alike kept in view. Before its passage, cases taken to the circuit court on appeal from a justice's court were tried on substantially the same issues as in the court below, and this had been regarded for years by the profession as a serious hindrance to the administration of justice. It was to remedy this mischief that section 7 was embodied in the act of 1893, and it seems to us

to be susceptible of such an interpretation as will accomplish the purpose designed. The elimination of the restrictive words "so as not to substantially change the issues tried in the justice's court or introduce any new cause of action or defense," is another significant circumstance suggestive of the legislative intent. These words are not to be found in the new law, either in terms or in substance, and hence the conclusion is obvious that the legislature intended to change the rule by the omission. Reading the act of 1893, so far as applicable to the matter now in hand, it provides that "the statement * * * of the defendant's counterclaim or set-off, or other ground of defense, filed before the justice, may be amended upon appeal in the appellate court to supply any defect, deficiency, or omission therein by filing formal pleadings therein, when by such amendment substantial justice will be promoted." Giving to this language the liberal construction due to a remedial statute, it seems plainly to mean that a defendant may, by permission of the circuit court, file an amended answer in that court, raising a defense which he omitted in the court below, when by such amendment substantial justice will be done.

Much stress is laid on the fact that the statute provides that the amendment shall be made "by filing formal pleadings," and from this it is argued that it must necessarily refer to oral or informal pleadings, because, if they were formal, there could be no room for an amendment of the character designated in the act. But when we look at the whole act it is apparent that it intends to treat all the proceedings in a

justice's court as informal, and contemplates that whether the pleadings therein be oral or written, or whatever their form, they are not to be judged by the technical rules prevailing in courts presided over by men learned in the law, aided and assisted by skillful counsel. The plain import of the statute is that the justice may try the cause between the parties before him without regard to technical rules; and then, if his judgment is not satisfactory to either party, the whole controversy may be taken to the circuit court on appeal, reduced to proper form, subject to the limitation heretofore noticed, and there determined according to the more accurate rules of procedure. Under any other view, the legislature, instead of enlarging the rule and remedying the existing mischief, as it evidently intended to do, has inadvertently produced the opposite result, and made matters even worse than before. Under the act as interpreted by the court below, if the defendant in a justice's court files a written pleading, and in good faith attempts to state his defense to an action brought against him, and, either through the ignorance or mistake of himself or his attorney, omits to get all his defense there stated in some form, he cannot supply the omission in an appellate court by an amendment, however meritorious it may be. Such construction of section 7 of the act of 1893 would greatly impair its usefulness. As we understand this act, pleadings on an appeal from a justice's court, whatever their form, may, by permission of the circuit court, be now amended whenever, by such amendment, substantial justice may be done, except that the plaintiff cannot be permitted to intro-

duce any new items or cause of action not embraced or intended to be included in the original account or statement as filed by him. Nor does this construction of the statute conflict with the decision in *Waggy v. Scott*, 29 Or. 386, (45 Pac. 774,) although it is not in harmony with some of the reasons given therefor in the opinion. In that case the question was whether the circuit court could permit an answer to be filed in that court for the first time, and it was ruled that it could not, for the very reason that there was no statement made or filed in the court below which could be amended. Before there can be an amendment there must evidently be something to amend. But where a defendant appears in a justice's court, and makes a defense to the action on the merits, whether his pleading is oral or in writing, or however formal it may be, the circuit court has power, under the act of 1893, to allow him to file an amended answer in that court, setting up a new and additional defense. That this was the evident purpose of the act can hardly be questioned. This construction certainly promotes substantial justice, because, unless a defendant can amend his answer so as to present a defense in an action then pending, which he has omitted through excusable neglect or inadvertence, he is forever barred from making such defense, and must suffer a judicial wrong. And this, it seems to us, is the reason the legislature was particular to confine the provisions of the latter clause of section 7 to proposed amendments to the cause of action, and not the defense; for, if a plaintiff should omit some particular item or cause of action, the judgment would probably not be a bar to a subsequent ac-

tion thereon, while, if the defendant is not permitted to make his defense to an action while pending, it cannot avail him thereafter. Entertaining these views, it is apparent that the court below erred in not allowing defendant to file an amended answer as requested, and for this reason the judgment must be reversed, and remanded for further proceedings not inconsistent with this opinion.

REVERSED.

MR. CHIEF JUSTICE MOORE, (dissenting).

Regretting that I cannot assent to the conclusion reached in this case by my associates, and believing that any oral or informal pleadings in a justice's court can be amended in the circuit court on appeal, and that no new defense can be introduced by such amendment, I shall discuss what seems to me to be the legislative intent, so far as it can be ascertained from an examination of the act of 1893 (Laws 1893, p. 38). This act provides, in substance, that no formal or written pleadings are required in a justice's court, but that they may be either oral or in writing; and, when the former, the justice may enter the substance thereof in his docket, and, if the action be upon a written instrument or account, the original or a copy thereof shall be filed before process shall issue. If the defense or counterclaim relied upon be founded upon a written instrument or account, the defendant shall, before trial, file the same or a copy thereof with the justice; and whenever an appeal from a judgment rendered in a justice's court is perfected, the circuit court shall proceed to hear and determine the cause

anew, disregarding irregularities and imperfections in matters of form which may have occurred in the proceedings in the justice's court. In all cases of appeal, the bill of items of the account sued on or filed as a counterclaim or set-off, or other ground of defense filed before the justice, may be amended upon appeal in the appellate court to supply any defect, deficiency, or omission therein by filing formal pleadings, when by such amendment substantial justice will be promoted; but no new item or cause of action not embraced or intended to be included in the original account or statement shall be added by such amendment.

That this act was designed to simplify proceedings in a justice's court must be admitted, but that it was intended by the repeal of section 80 of chapter 9 of the Justice's Code, and the adoption of section 7 of the act in question in lieu thereof, to enlarge the powers of the circuit court in the matter of amendments may well be doubted. Such power is expressly limited by the latter clause of section 7, which provides that "no new item or cause of action not embraced or intended to be included in the original account or statement" shall be added by amendment; and it will be observed that it is further limited and exclusively confined to cases on appeal in which no formal pleadings have been filed in the court below. Section 1 of this act, in prescribing the manner of alleging a probative fact in a justice's court, declares that "no formal or written pleadings are required." It would thus seem that the legislative assembly has defined the term "formal pleadings" to mean written

pleadings, and thus, impliedly at least, provided that no written or formal pleading could be amended on appeal to the circuit court; for, if the legislative assembly had intended by the act of 1893 to confer upon such court the same power over the formal pleadings in an action removed thereto by appeal which it has in an action originally commenced therein, it would have so provided in the statute, or retained the old law on the subject.

It is claimed that the act in question, being remedial, should receive a liberal construction, and such is undoubtedly the general rule, but, when there is no ambiguity in the provisions of a statute, there is no room for judicial construction. The nearest approach to equivocal language, and the only reason that can possibly be assigned for allowing the proposed amendment, is to be found in the latter clause of section 7, to the effect that "no new item or cause of action, not embraced or intended to be included in the original account or statement, shall be added by such amendment." The omission of the words "or defense, counterclaim or set-off," after the word "action," in the sentence quoted, leaves an inference, upon a casual examination, that, while the legislature intended to prohibit the plaintiff from introducing a new cause of action not embraced or intended to be included in the original account or statement, it granted permission to the defendant to interpose as many defenses, counterclaims, or set-offs by amendment in the circuit court on appeal as he saw proper to avail himself of. But when the entire statute is read in the light of the limitations and qualifications therein contained, it

will be perceived that the word "statement" alludes to the oral declaration made by the plaintiff or defendant of the facts constituting his cause of action, or defense, counterclaim or set-off, the substance of which is entered by the justice in his docket, and that such "statement" may be amended in matters of form only, by filing formal pleadings, when by such amendment substantial justice will be promoted. Now, since the addition of a new defense, counterclaim or set-off, not embraced or intended to be included in the original account or statement, would amount to an amendment in matters of substance, the inference raised by the omission of the words hereinbefore stated is dispelled, and it becomes manifest that the defendant has no more right to insist upon an amendment stating any matter omitted by him than has the plaintiff, and evidently the legislature intended that the circuit court on appeal should confine itself to the trial of the issues joined in the court below.

But, aside from this phase of the case, the court in this instance was powerless to allow the proposed amendment for the following reasons: (1.) It will be observed that upon the appeal being perfected "the circuit court shall proceed to hear, try, and determine the cause anew, disregarding irregularities and imperfection in matters of form which may have occurred in the proceedings in the justice's court." Now, since the cause is tried *de novo* on appeal, without regard to any action of the justice's court, the proceedings referred to in the language quoted must necessarily mean the pleadings in the action, and, this being so, the trial court would have power to allow

amendments correcting irregularities and imperfections in matters of form, but under the maxim "*expressio unius est exclusio alterius*," it must necessarily be an implied prohibition against the allowance of any amendment in matters of substance. The answer filed in the justice's court contained a specific denial of the allegations of the complaint, while the amendment, if allowed, would have introduced in the appellate court an allegation of new matter constituting an independent defense, and, this being so, it will scarcely be denied that the proposed improvement in the pleading went to the merits of the case, and for this reason was a matter of substance. (2.) It is argued with much force in the prevailing opinion that a written pleading is but a statement of plaintiff's cause of action, or of the defendant's ground of defense; and, based upon this definition of the word, it is claimed that the legislature, by permitting the "statement" to be amended on appeal, did not intend that any distinction should be made between written and oral pleadings, but that they should be alike subject to amendment on appeal. It may be admitted that the conclusion reached might be deducible from the reason adopted if the major premises used were universally true, but it is only partially so; for it is the complaint only that shall contain a plain and concise statement of the facts constituting the cause of action (Hill's Ann. Laws, § 66), while the answer shall contain a specific denial of each allegation of the complaint, and may contain a statement of new matter constituting a defense or counterclaim: Hill's Ann. Laws, § 72. The statute has here limited the word

"statement," as applied to pleadings, and practically defined it to mean an affirmative allegation of a material probative fact constituting a cause of action or a defense or counterclaim; and hence it must be presumed that the legislative assembly in adopting the word, as applied to the matter of presenting issuable facts, used it in this restricted sense. As a corollary, it would seem to follow that since the answer contained a specific denial only of the material allegations of the complaint and not an affirmative allegation of a material fact constituting a defense or counterclaim, it was not a "statement" within the meaning of the act of 1893, and therefore not subject to amendment on appeal. For these reasons the judgment, in my opinion, should be affirmed.

AFFIRMED.

[Decided February 23, 1897.]

RIGGEN v. INVESTMENT COMPANY.

(47 Pac. 923.)

EFFECT OF DISSOLUTION OF PARTNERSHIP.—The dissolution of a partnership by the mutual consent of all its members does not destroy the firm's identity, which, in contemplation of law, continues until its debts are paid and its affairs wound up.

POWERS OF PARTNERS AFTER DISSOLUTION.—Each partner, after the voluntary dissolution of the firm, has the same power to collect debts due the firm, unless he has assigned his interest therein, that is possessed by a partner in the ordinary course of the partnership business.

DISSOLUTION OF PARTNERSHIP—ASSIGNMENT OF INTEREST BY RETIRING PARTNER.—A dissolution agreement contained an assignment by the retiring partner to the other of all his interest in the business, and provided that each partner was to pay one-half the firm debts, and that the continuing partner should collect money due, and pay the retiring member one-half thereof. *Held* not an assignment by the retiring partner of his interest in commissions earned by the firm before dissolution.

USE OF FIRM NAME BY RETIRING PARTNER—ESTOPPEL.—A retiring partner who agreed that the other member of the firm should have the sole right to settle the partnership business and use the firm name was not thereby estopped from suing in the firm name to recover a firm debt; for no interest in the partnership property was thereby transferred, but only an agency, and the power that created that relation was equally competent to destroy it.

From Multnomah: E. D. SHATTUCK, Judge.

Action by S. B. Riggen and another against the Investment Company. From a judgment dismissing the action on the pleadings, plaintiffs appeal.

REVERSED.

For appellants there was a brief over the name of *George, Gregory & Duniway*, with an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. George H. Williams*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action by S. B. Riggen and F. B. Holbrook against the Investment Company, a corporation, to recover compensation for services in negotiating sales of real property. The plaintiffs allege that on October 7, 1890, they were partners in business as real estate brokers, and on that day entered into a contract with the defendant by the terms of which they agreed to sell, if possible, all the lots and blocks in Irvington Park, Multnomah County, belonging to the defendant, and for such sales as they could make the defendant promised to pay them all sums realized

thereon above the rate of \$800, net, per acre; that on October 17, 1891, the partnership was dissolved, Riggen retiring therefrom and Holbrook continuing the business, but each partner retained his interest in all commissions theretofore earned by the firm; that prior to such dissolution they, in pursuance of the terms of the agreement, sold to one F. R. Musser two lots in said tract for \$250, and the purchaser, having paid that amount to the defendant, obtained its deed for the premises; that under said contract plaintiffs were entitled to \$169.10, as commissions on account of such sale, but the defendant paid thereon \$95 only, leaving \$74.10 still due them. The complaint contains nine other similar but separate causes of action, and a prayer for judgment for the sum of \$2,277. The defendant, answering specially, in the nature of plea in bar, alleges that Riggen, in the agreement of dissolution, assigned all his interest in the business of the firm to Holbrook, and gave the latter the sole right to use the name of the firm, to collect all moneys due to it, and to settle up its affairs; that this action had been commenced by Riggen without the authority, consent, or knowledge of Holbrook, and that the former had no right to maintain the same in the name of, or to collect any of the commissions due, the firm. The reply, after admitting that the action was instituted by Riggen in the name of the firm, denies the material allegations of the answer, and also sets out a copy of the contract of dissolution, from which it appears that Riggen assigned to Holbrook all his interest in the business, and agreed that the latter should have the sole right to settle up the affairs of the firm,

and to collect all moneys due it, but on condition that he should immediately render a true account and pay Riggen one-half thereof, free from all charges for such collections. Holbrook was also granted the sole right to use the firm name for one year, and thereafter until ninety days' written notice of the revocation thereof by Riggen, after which neither member of said firm was to use its name. Holbrook agreed to pay Riggen 25 per cent. of the gross profits thereafter derived from the sale of the Irvington property, and each agreed to pay one-half of all debts of the firm, but Riggen was not to be responsible for any indebtedness thereafter incurred. A demurrer to the reply having been sustained, and the plaintiffs declining to plead further, a judgment dismissing the action was given, from which they appeal.

The important question for consideration is whether Riggen, in the contract of dissolution, assigned to Holbrook his interest in the commissions therefore earned by the firm. The rule seems to be well settled that the dissolution of a partnership by the mutual consent of all its members does not destroy the firm's identity, which, in contemplation of law, continues to exist until its debts are paid and its affairs wound up: *Brown's Executor v. Higginbotham*, 27 Am. Dec. 618; *Gannett v. Cunningham*, 34 Me. 56. As a corollary from this rule, it necessarily follows that each partner, after the dissolution of the firm of which he is a member, has the same power to collect debts due the firm, unless he has assigned his interest therein, that is possessed by a partner in the ordinary course of the partnership business, (*Major v. Hawkes*,

12 Ill. 298; *Gordon v. Freeman*, 11 Ill. 14; *Robbins v. Fuller*, 24 N. Y. 570,) and hence all active partners at the time when a contract is made with the firm should join in an action for the breach of it: Dicey on Parties, 151; Hawes on Parties, § 88; *Lunt v. Stevens*, 24 Me. 354. In *Gram v. Cadwell*, 5 Cow. 489, a partnership having been dissolved, it was agreed that the retiring member should receive his capital in ten days, while the remaining member was to assume the payment of all the firm debts. A debtor of the firm, having notice of the agreement of dissolution, paid his debt to the retiring partner, and, an action having been thereafter brought against him by the remaining partner, it was held that the agreement was a virtual conveyance of the interests of the retiring member, and, this being so, a payment to him by one having notice of the assignment was not a discharge of the firm debt, and hence not a bar to the action. In that case the agreement of dissolution having provided that the remaining partner should assume the payment of the firm debts, and also refund the amount of the retiring partner's capital, necessarily disposed of the latter's interest in the firm, except, possibly, the profits of the business, if any, and while the agreement did not, in terms, provide for the assignment of such interest, the court, in view of its provisions and of the valuable consideration paid, may have been justified in concluding that it was tantamount to an assignment. In the case at bar, however, each partner was to pay one-half the firm debts, and the retiring partner was to receive one-half of all moneys due the firm, free from all charges for collecting the same. We think it can

not be inferred from the agreement of dissolution that Riggen intended to assign to his partner his interest in the commissions earned by the firm; and that the right of Riggen to maintain this action in the name of the firm is unquestioned, unless he is estopped by his agreement that Holbrook should have the sole right to use the name of the firm.

Each partner is the agent of his copartners, and has implied authority from them to make such contracts as may be necessary or convenient for the successful operation of the partnership business; (Dicey on Parties to Actions, 267;) and hence each partner may occupy the dual character of principal and agent (Ib. 149). Holbrook, as a partner, had equal authority with Riggen to collect all moneys due the firm, and when the right to collect such debts was granted by Riggen no new or superior power was thereby conferred. In *Napier v. McLeod*, 9 Wend. 120, a partnership having been dissolved, one of the members was appointed by the others an attorney in fact, irrevocably, to collect the debts due the firm; and, having commenced an action against a debtor for goods sold and delivered, the latter pleaded that he had settled the account with and obtained from one of the members a release of all demands. The plaintiff, replying, set out a copy of the power of attorney, and alleged that the defendant had notice of the appointment; but, a demurer having been interposed thereto, it was held that no interest in the effects of the firm was transferred by the appointment, and, the instrument being the evidence of a mere naked power, the authority creating the agency was competent to destroy it,

notwithstanding the power purported to be irrevocable. To the same effect also see Story on Agency § 476, and *MacGregor v. Gardner*, 14 Iowa 326. Under the rule there announced, Riggen did not entirely abandon the right to participate in the liquidation of the partnership business, but might, at his own mere pleasure, resume the authority which he had ostensibly surrendered; and, as no interest in the commissions earned by the firm had been transferred, and as no rights of the defendant or of Holbrook are prejudiced thereby, Riggen is not estopped by his appointment, and Holbrook cannot insist upon acting as sole principal and agent, when his copartner has withdrawn his confidence, and seeks to enforce his strict legal right. Story on Agency § 463. The judgment will therefore be reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

[Argued April 21; decided May 1, 1897.]

BAKER v. STATE INSURANCE COMPANY.

(48 Pac. 699.)

1. INSURANCE POLICY—DESCRIPTION OF PROPERTY.—It is not necessary, in an insurance policy, that the locality be fixed or established by such technical legal descriptions as are usually employed in conveyances of title; thus, where a policy described the property, as "a frame dwelling house situated on and confined to the premises now actually owned and occupied by assured, to wit: Lots 27 and 28, block 8, in Harlington Addition to Mt. Tabor," and the proof showed the correct description to be the same numbered lots and block in Harlem Addition to East Portland, and that there was no such place as "Harlington Addition to Mt. Tabor," the variance is not fatal, since, after eliminating the erroneous portion of the description, enough remains to identify the property.

2. **WARRANTY OF OWNERSHIP.**—A warranty that the insured is the sole and undisputed owner of the insured property and that the title to the land is in her name, is not broken by the fact that legal title has not been conveyed to the insured, where she has gone into possession under a contract of purchase and has performed on her part all the conditions thereof to the date of application, as the term "title" is to be construed in the ordinary acceptance of the term.
3. **VALUE OF PROPERTY.**—A false statement as to the value of the property will not invalidate the policy, if given in good faith as the honest opinion of the insured.

From Multnomah: E. D. SHATTUCK, Judge.

M. E. Baker sued the State Insurance Company, of Salem, Oregon, on a policy of fire insurance, and recovered a judgment for the full amount claimed, from which defendant appealed.

AFFIRMED.

For appellant there was a brief over the names of *Messrs. R. & E. B. Williams* and *W. T. Slater*, with an oral argument by *Mr. Slater*.

For respondent there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Geo. H. Williams*.

Opinion by MR. JUSTICE WOLVERTON.

This is an action upon a policy of insurance to recover a fire loss of \$400 on a dwelling and \$200 on household furniture. The defense interposed is that plaintiff by her written application, and as an inducement for the issuance of the policy of insurance, made answers to certain inquiries touching the value of the building and land upon which it is situate, and the ownership and title of the land, in substance as fol-

lows: Q. What is the actual cash value of your land and buildings thereon? A. \$1,000. Q. Are you the sole and undisputed owner of said lands and property to be insured? A. Yes. Q. Is the title to the land on which said buildings are situated in your name? A. Yes; that by the terms of the application the plaintiff agreed that each of said questions was correctly answered, and that such valuations and statements were true, and a warranty upon her part, and that the acceptance of the risk and the issuance of the policy should be based solely upon such application; but that she answered falsely, in disregard of such conditions, whereby she has suffered a breach of the warranty, and thus rendered the policy void. The property insured is described in the policy as "situated on and confined to the premises now actually owned and occupied by the assured, to wit: Lots twenty-seven and twenty-eight, block eight, in Harlington Addition to Mt. Tabor, Multnomah County, Oregon," and it is described in substantially the same manner in the complaint, but the evidence shows that the premises upon which the dwelling was located are correctly described as lots twenty-seven and twenty-eight, in block eight, Harlem Addition to East Portland, and it was further shown, over the objection of defendant, that there was no such place as "Harlington Addition to Mt. Tabor."

1. Upon this state of the record, it is first contended that there is a complete and fatal variance between the pleadings and the proof touching the description of the property covered by the policy of insurance, by reason whereof plaintiff is not entitled to recover. The objection goes to the identification of the *locus in*

quo of the dwelling, and it is not a question whether the description is sufficient to carry title, or to identify property conveyed or transferred. It is never necessary, in insuring property, that the locality be fixed or established by such technical legal descriptions as are usually employed in conveyances of title, and it is not infrequently the case that insurance companies employ maps, for convenience in the designation and location of buildings and property for insurance purposes, which have no sort of reference to any public or legal surveys or plats, and descriptions by reference thereto are accounted sufficient. As it pertains to the location, and the question whether the loss is within the policy, the evident intention of the parties, to be gathered from the language used, in connection with the nature of the property and the uses and purposes to which it is devoted, will prevail: 1 Wood on Insurance § 47. And it has been held in California that if enough of the description is true to identify the property, other portions of it which are false may be disregarded, when the question is merely what property was insured: *Hatch v. New Zealand Insurance Company*, 67 Cal. 122 (7 Pac. 411); 2 May on Insurance § 420 *a*. Omitting and disregarding all reference to "Harlington Addition to Mt. Tabor" or to any subdivision thereof, we think there is enough left to identify the property insured, and it was pertinent to show that there was no such addition, but that Harlem Addition to East Portland was the one to which reference should have been made. There would be left the following description, viz: "A frame dwelling house situated on and confined to premises

now actually owned and occupied by the assured," and this is sufficient for the purposes of the insurance, and for a recovery in the case of loss. There was a latent ambiguity, and the evidence offered was competent to explain it.

2. It appeared from the testimony that plaintiff was not the owner in fee of the land upon which the dwelling was situated at the time the insurance was effected, but that she held a contract with the owners of the legal title for a conveyance by good and sufficient deed, conditioned upon her completing payment therefor in certain installments and at designated dates; and it is contended that this discloses a state of affairs inimical to plaintiff's warranty touching the ownership and title. The warranty is in substance that plaintiff is the sole and undisputed owner of the lands and property insured, and that the title to the land is in her name. It goes to the ownership and title to the land, and the question is, do the record and proofs show the warranty to be false? If they do, the plaintiff cannot recover. In *Susquehanna Insurance Co. v. Staats*, 102 Pa. St. 529, a purchaser at sheriff's sale, subsequent to the purchase but prior to the delivery of the sheriff's deed, represented to the company that the land was "owned by the applicant," and it was held that there was no such absence of title in the assured as that the representation would affect the validity of the policy. In *Pennsylvania Insurance Co. v. Dougherty*, 102 Pa. St. 568, the assured purchased from executors a lot of ground upon which there was a building, paid the purchase money, received a receipt, and had gone into possession, but prior to the

execution of the deed she had the building insured. By her application she represented that the title to the house and lot was in her name, and by the terms of the contract of insurance the answers and representations made in the application were taken as part of the contract, and were warranted to be true; and the court held that, as the equitable title to the property was vested, it was for all the purposes of the suit equivalent to a fee. In *Lebanon Insurance Co. v. Erb*, 112 Pa. St. 149 (4 Atl. 8), it was held that it was not essential that the assured should have been invested with the legal title, if he was the sole, absolute, and beneficial owner in equity, and this under a condition in the policy as follows: "If the property to be insured be held in trust or on commission, or be leasehold or other interest not amounting to absolute or sole ownership, * * * it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance as to such property shall be void." In *Fire Insurance Co. v. Dyches*, 56 Tex. 573, it was held that where the entire equitable right in or to the land is in the assured, and he is in a condition to enforce specific performance, there is no breach of the warranty. In *Hough v. City Fire Insurance Co.*, 29 Conn. 10 (76 Am. Dec. 581), the assured represented by his application that the property insured was "his house," and the policy contained a condition that "if the interest in the property to be insured is not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void." The legal title was, however, in another person, with whom he

had at the time a parol contract for its purchase for an agreed price, part of which he had paid, and he had entered into possession; and it was held that his equitable title should be regarded as an absolute interest, and therefore that the insurance was not void. To the same effect is *Gaylord v. Lamar Fire Insurance Co.*, 40 Mo. 15 (93 Am. Dec. 289); *Swift v. Vermont Fire Insurance Co.*, 18 Vt. 305; *Pelton v. Westchester Fire Insurance Co.*, 77 N. Y. 605; *Rumsey v. Phoenix Fire Insurance Co.*, 17 Blatch. 527 (1 Fed. 396); *Martin v. State Insurance Co.*, 44 N. J. Law, 490 (43 Am. Rep. 397); *Bonham v. Iowa Central Insurance Co.*, 25 Iowa, 328. The instructions of the learned trial judge touching the question proceeded upon the theory that if plaintiff had contracted for the purchase of the land upon which the building was situated, had gone into possession and performed on her part all the conditions thereof to the date of the application, she should be deemed to be the owner, and, for the purposes of the policy, the title was in her name. This is in full accord with the authorities cited, and is, as we believe, the law of the case. The plaintiff, if not in default, was the sole and undisputed equitable owner of the lands, and when she answered that the title was in her name, she answered truly, in the ordinary acceptation of the term. In common parlance the term is used to express ownership, regardless of any technical legal import, and an absolute equitable ownership fills the measure of common understanding quite as fully as legal ownership. It was not expected that plaintiff should answer technically touching her ownership and title, and the construction of her war-

ranty ought not to be circumscribed as if she had spoken in a technical sense. These conclusions are especially applicable in the present case, as it was shown that when the plaintiff made the application she produced her contract for the inspection of the agent, who wrote out the answers for her, and no doubt they were given with special reference to her title as acquired by and through the contract.

3. The answer touching the value of the land and building involved somewhat the expression of an opinion; and unless it is tinctured with fraud, or so widely at variance with the truth that a fraudulent purpose must be presumed, it ought not to render the policy void. The honest judgment and opinion of the party making such valuation is all that is required: *Phoenix Insurance Co. v. Pickel*, 119 Ind. 155 (12 Am. St. Rep. 393, 21 N. E. 546, 18 Ins. Law Jour. 598). The question was submitted to the jury in this light, and properly so. The question involved in the motion for nonsuit, if it can be urged at all under the pleadings, is necessarily disposed of by the foregoing considerations. The judgment is affirmed.

AFFIRMED.

[Argued April 20; Decided May 1, 1897.]

WYATT v. HENDERSON.

(48 Pac. 790.)

MOTION FOR JUDGMENT—SUFFICIENCY OF COMPLAINT ON APPEAL.—The allegations and admissions in a reply cannot operate to render a complaint which is sufficient on its face obnoxious to an objection that it fails to constitute a cause of action, but if the admissions of the reply so contradict the allegations of the complaint as to defeat the right of action the remedy must be by motion for a judgment on the pleadings.

31	48
37	494
38	514

31	48
40	108
31	48
42	485

ESTOPPEL TO CHANGE POSITION AFTER SUIT.—After a party to a controversy has assumed a position he cannot during the progress of the litigation change his ground, as, for example, in a replevin action for goods in store, the warehouseman cannot answer denying plaintiff's ownership, and then on the trial claim to hold the property under a lien for storage.

IMMATERIAL EVIDENCE.—Warehouse receipts are inadmissible on behalf of a warehouseman to show the quantity of goods delivered to him, in an action for such goods by one who does not claim under the receipts, or the person to whom they were issued.

From Linn: GEORGE H. BURNETT, Judge.

Action by E. T. Wyatt against George Henderson and J. W. Stuchell to recover possession of certain oats. There was a verdict and a judgment for what portion of the property remained on hand, and defendants appeal.

AFFIRMED.

For appellants there was a brief over the names of *W. R. Bilyeu*, and *Williams, Wood & Linthicum*, with an oral argument by *Mr. Bilyeu*.

For respondent there was a brief over the names of *James K. Weatherford*, and *Blackburn & Somers*, with an oral argument by *Mr. Weatherford*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action to recover the possession of five thousand bushels of oats, or, if the same cannot be had, the sum of \$1,250, as the value thereof. The facts are that on September 11, 1894, one J. C. Bohannon, in consideration of \$1,300, executed to the plaintiff a bill of sale of a quantity of oats, which recited that one thousand bushels were then stored in the

defendant's warehouse, and the remainder, or five thousand bushels, was in sacks on the plaintiff's farm in Linn County. Bohannon having agreed, as a part of the consideration, to haul the latter quantity to the said warehouse, delivered the same thereat, but took, in his own name, negotiable warehouse receipts therefor, as follows: No. 115, September 18, 1894, eight hundred and seven thirty-sixth bushels; No. 127, September 22, 1894, two thousand six hundred and thirty two and twenty two thirty-sixth bushels; No. 129, September 24, 1894, three hundred and eighty-one and twenty-four thirty-sixth bushels; and No. 131, September 24, 1894, two hundred and eighty-three and thirty-three thirty-sixth bushels, in each of which it was stipulated that the grain was received on storage until June 1, 1895, at two cents per bushel, and that if such receipt were purchased by any one except the defendant the holder thereof would be obliged to pay for the sacks and storage before the oats would be delivered. On September 18, Bohannon assigned to the defendants receipt No. 115, and the value of the oats therein represented was credited on a debt due from him to them, and three days thereafter they shipped and delivered to Everding and Farrell at Portland six hundred and ninety-five bushels and twenty-six pounds of said grain. On September 24, at Bohannon's request, they negotiated a sale of the oats represented in receipts numbered 129 and 131, and shipped the same to Banford & Rand at Portland. Bohannon assigned and delivered to E. E. McKinney & Company, at Albany, receipt No. 127, but at the trial of this action

the same had not been returned to the defendants, and the oats therein represented were in their possession. The complaint alleges that plaintiff is the owner and entitled to the possession of five thousand bushels of oats, in store in defendant's warehouse, and which were placed therein by Bohannon, and is the same grain that was raised by the latter on plaintiff's farm; that on September —, 1894, the defendants were and now are in possession of said property, and on October 8 of that year plaintiff duly demanded possession of the same, but the defendants refused to deliver any part thereof, and unlawfully retain the possession of the same.

The answer, after denying the material allegations of the complaint, alleges that the defendants were engaged in operating a warehouse for the purpose of storing grain for hire; that, as such warehousemen, it became their duty to issue warehouse receipts for grain received; to hold said grain subject to the demands of the holders of such receipts; and to charge therefor the sum of two cents per bushel and sackage for grain so stored; that Bohannon, having in his possession and being the ostensible owner of a quantity of oats, notoriously and openly held himself out to the world as the actual and bona fide owner thereof, and hauled and delivered the same to the defendants at their warehouse, and upon his demand therefor they issued to him said warehouse receipts for four thousand and ninety-eight bushels and fourteen pounds. And, after detailing the manner of disposing of the receipts and of the grain represented thereby, as hereinbefore stated, the answer further alleges "that they

have at all times been and now are ready and willing to deliver said oats and every part thereof to the lawful owners and holders of said receipts, upon payment of their just charges for the storage and sackage of said oats, and that plaintiff has not at any time made demand on defendants for said oats or any portion thereof, or exhibited to defendants any right or title thereto." The reply having put in issue the allegations of new matter contained in the answer, a trial was had, resulting in a verdict and judgment that plaintiff was the owner and entitled to the possession of three thousand five hundred bushels of the said grain, or \$700, the value thereof, from which judgment the defendants appeal.

It is contended by counsel for the defendants that, taking the allegations of the complaint and reply together, they show that the oats in question were stored in defendant's warehouse for hire, and, not having alleged a payment or tender of the charges due thereon, the plaintiff has failed to state a cause of action, for which reason the judgment should be reversed. The error here insisted upon is not assigned in the notice of appeal, but the objection that the complaint does not state facts sufficient to constitute a cause of action is never waived by a failure to demur or answer, and it has been repeatedly held that this question may be raised in the appellate court for the first time, and that, too, without an assignment of errors: *Hill's Ann. Laws* § 71; *Bowen v. Emmerson*, 3 Or. 452; *Evarts v. Steger*, 5 Or. 147; *Mack v. City of Salem*, 6 Or. 275; *McKay v. Freeman*, 6 Or. 449; *Weissman v. Russell*, 10 Or. 73; *Woodruff v. Douglas County*, 17 Or. 314 (21 Pac. 49);

Carver v. Jackson County, 22 Or. 62 (29 Pac. 77); *Ball v. Doud*, 26 Or. 14 (37 Pac. 70). The statute declares, in substance, that it shall be the duty of every person keeping any warehouse where grain is stored to deliver to the owner of such grain a warehouse receipt therefor, upon the presentation of which, and the payment of all charges due thereon, the owner shall be entitled to the immediate possession of the grain named in such receipt (Hill's Ann. Laws, §§ 4201 and 4206); and if any person shall safely keep in store any grain at the request of the owner or lawful possessor thereof, he shall have a lien upon the same for his just and reasonable charges, and may retain possession of such property until such charges are paid: Hill's Ann. Laws, § 3684. The complaint states that the oats were stored by the defendants in their warehouse, but it nowhere alleges that the grain was so stored for hire; and the reply, while it admits that they "operate said warehouse and conduct and run the same for the purpose of storing grain for hire, and accept and receive such grain as delivered to said warehouse and hold the same on storage," does not directly aver that the oats in question were stored therein for hire. "A plaintiff in an action or suit," says THAYER, J., in *Lillenthal v. Hotaling Company*, 15 Or. 371, (15 Pac. 630,) "must recover, if at all, upon his complaint. The facts constituting his cause of action or suit must there be stated; a reply can serve him no purpose except to controvert or avoid new matter set up in the answer. The old rule, that every pleading on the part of the plaintiff, subsequent to the declaration, and on the part of the defendant, subsequent to the plea, could

only be used to fortify, respectively, the declaration and plea, is still in force, in principle; and it matters not what may be alleged in a reply, if the complaint fails to state a cause of suit, the plaintiff will not be entitled to any relief." The right of a plaintiff to the relief for which he prays must be measured by the allegations of his complaint, and not by what he may aver in his reply; and if the admissions of the latter so contradict the allegations of the former as to defeat the right of action, the remedy must be by motion for a judgment on the pleadings; and where the allegations in an answer which constitute a complete defense to plaintiff's cause of action are not denied by the reply judgment will be rendered for the defendant upon motion therefor, notwithstanding a verdict for the plaintiff: *Benicia Agricultural Works v. Creighton*, 21 Or. 495 (28 Pac. 775, 30 Pac. 676). The complaint in the case at bar is in the usual form, and states facts sufficient to constitute a cause of action, and hence it is not vulnerable to the objection urged against it.

The defendants having denied, upon information and belief, that the plaintiff was the owner or entitled to the possession of any of the said oats, cannot now be permitted to say that their refusal to deliver the grain in question was caused by the failure of the plaintiff to pay the storage thereon. The refusal of the defendants to deliver the grain was put upon the ground that plaintiff was not the owner of the property, and upon this theory he would not be entitled to nor could he obtain the possession of the oats by the payment or tender of the costs of storage. If the defendants received this grain on storage from the

owner thereof, to whom they issued receipts therefor, they would be entitled to a reasonable compensation for their care, and could hold the property until this sum was paid by the lawful holders of the receipts, but they could waive the lien thus given them by the statute: 28 Am. and Eng. Encl. Law, (1st ed.,) 666. "Where a party," says Mr. Justice SWAYNE, in *Railway Company v. McCarthy*, 96 U. S. 258, "gives a reason for his conduct and decision touching anything in action in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." The rule is well settled that a bailee cannot be allowed to deny a plaintiff's title to property before suit is brought, and afterwards defeat a recovery by setting up a lien thereon: *Dows v. Morewood*, 10 Barb. 183; *Holbrook v. Wight*, 24 Wend. 169 (35 Am. Dec. 614); *Wallace v. Minneapolis Elevator Company*, 37 Minn. 464 (35 N. W. 268); *Scott v. Jester*, 13 Ark. 437; *Hanna v. Phelps*, 7 Ind. 21 (63 Am. Dec. 410); *Rogers v. Weir*, 34 N. Y. 463; *Leigh v. Mobile R. Company*, 58 Ala. 165. It is contended that the court erred in refusing to allow defendants to introduce in evidence the warehouse receipts, for the purpose of showing that storage was due on the oats in question. But this must prove unavailing for it was claimed by the defendants at the trial that plaintiff had no title to the grain, and hence he could not be charged with any storage thereon. A bailee who alleges the title to be in another does so at his peril, and, by retaining the goods, he makes him-

self a party to the controversy, and must stand or fall by the title of his alleged bailor: *Rogers v. Weir*, 34 N. Y. 463. The defendants, by executing to Bohannon warehouse receipts for the grain, and subsequently taking an assignment of these evidences of deposit, recognized the latter's ownership of the oats, upon the faith of which they denied the plaintiff's title, which was not derived from any of these receipts.

Nor do we think there was any error committed in the court's refusal to permit the witness George Henderson to testify concerning said receipts, to the effect that all the oats received from Bohannon during the year 1894 was included therein, or in refusing to permit him to testify that there was storage due the defendants thereon. The defendants, in order to limit the plaintiff's recovery, had the undoubted right to show the quantity of oats so delivered by Bohannon, but to permit them to prove this fact by the introduction of the receipts in question, which were not executed to the plaintiff, would be equivalent to allowing a party unlawfully to obtain a given quantity of any commodity, and to defeat a recovery of the possession of a portion thereof by the introduction in evidence of his own self-serving declarations. The only possible object defendants could have had in seeking to show that storage was due on this grain was to insist upon the maintenance of a statutory lien thereon, under which they expected to hold the oats until their charges had been paid, and thus defeat the action for the recovery of possession; but, by denying the plaintiff's ownership, the lien given by statute was waived,

and the title to and the quantity of the grain being the only issues for trial, the amount due for storage was immaterial. Counsel for the defendants, in their brief and argument, insist upon other alleged errors of the trial court, but as they are not, in our judgment, properly assigned in the notice of appeal, we do not deem it necessary to consider them, and hence it follows that the judgment is affirmed.

AFFIRMED.

[Decided June 1, 1897.]

BURROWS v. PARKER.

(48 Pac. 1100.)

EXECUTION SALE—EQUITABLE RELIEF AGAINST MISTAKE.—Where, by mutual mistake, a deed describes property other than that purchased, and the land described in the deed is sold on execution against the vendee, the sale is void; and equity cannot, at the instance of a grantee of a purchaser at the execution sale, correct the error so as to give him title to the land actually purchased by the vendee.

From Baker: ROBERT EAKIN, Judge.

Cross bill by C. E. Burrows and others against J. H. Parker. There was a decree striking out the cross bill, and plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the name of *Olmstead & Courtney*, with an oral argument by *Mr. Martin L. Olmstead*.

For respondent there was a brief over the name of *Butcher & Estham*, with an oral argument by *Mr. W. F. Butcher*.

Opinion by MR. JUSTICE BEAN.

In January, 1897, the defendant Parker commenced an action at law against the plaintiffs to recover possession of certain real property in Baker City, and damages for the unlawful detention thereof. The defendants in that action (the plaintiffs here) appeared, and filed an answer, denying specifically all the material allegations of the complaint, and at the same time, as plaintiffs, filed their complaint in equity, setting up and alleging facts which they claim require the interposition of a court of equity, and are material for their defense in the law case. This complaint or cross bill was stricken out on motion, and the plaintiffs appeal.

By the alleged cross bill it is averred, substantially, that on the seventeenth day of September, 1888, the Baker City Gas & Electric Light Company, being desirous of obtaining a tract of land upon which to build and construct its proposed gas plant, buildings, machinery and appliances, authorized and empowered the defendant Parker, its president and manager, to purchase a suitable site for that purpose, and to take the deed in his own name, as security for the purchase price which he agreed to advance for the benefit of the corporation. In pursuance of this arrangement, Parker purchased the tract of land in controversy from L. O. Stearns and wife, in September, 1888, paying therefor the sum of \$1,000; but by a mutual mistake of the parties, the land actually purchased was not described in the deed to Parker, but the premises purported to be conveyed thereby were situated some two hundred feet south thereof. The gas company, in ignorance of this mistake, immediately

went into possession of the land actually purchased by Parker, and erected thereon a gas plant, machinery, fixtures and appliances at an outlay of some \$12,000, and occupied the same until it surrendered possession thereof to the purchaser at the execution sale on the Basche judgment hereinafter referred to. On November 4, 1890, while the company was in possession of the property, and conducting and operating its plant, P. Basche & Co. recovered a judgment against it for \$924.37, and on June 22, 1893, Balfour, Guthrie & Co. also recovered a judgment for \$1,109.50, each of which judgments was duly docketed in the judgment lien docket of Baker County. Thereafter an attempt was made to sell the property of the gas company under an execution issued on the Basche judgment, but it was described in the notice of sale and order of confirmation the same as in the deed from Stearns to Parker. At this sale, Basche & Co. became the purchasers for the sum of \$650, and thereafter Balfour, Guthrie & Co., by virtue of their judgment, redeemed or attempted to redeem, and immediately went into possession of the property, and thereafter received from the sheriff a deed of conveyance in which the same error of description occurred. On February 8, 1895, and while in possession of the property, Balfour, Guthrie & Co. discovered the mistake in the Parker deed, and immediately obtained a deed of correction from the Stearns heirs, and thereafter sold and conveyed the property and appurtenances to the plaintiffs in this suit for the sum of \$2,000. On May 30, 1895, Parker, having in the meantime discovered the error in his deed, brought

suit against the Stearns heirs (the original grantors having died), to compel a correction of the error in the deed from their ancestors to him, and obtained a decree to that effect in July, 1895. The complaint further alleges that all the money advanced by Parker to purchase the land in controversy from Stearns was repaid to him by the gas company prior to the sale or attempted sale under the Basche judgment, except the sum of \$125, which the plaintiffs and their predecessors in interest have duly tendered to him, and, by their complaint, offer to pay such amount, or any other sum for which it may be found Parker is entitled to hold the title of the land in controversy as security.

The motion to strike out the cross bill is based upon two grounds: First, that the answer in the law case, being a specific denial of every material allegation of the complaint, is, if true, a complete defense at law, and therefore resort cannot be had to equity; and, second, the facts as alleged in the cross bill do not entitle the plaintiffs to any relief requiring the interposition of a court of equity, and material to their defense in an action at law. As we are all clearly of the opinion that the motion should be sustained upon the second ground, we shall pass, without deciding, the question of practice raised by the first.

The cross bill is framed, and counsel's argument proceeds on the theory, that, while absolute in form, the deed under which Parker claims was intended, and is, as between him and the gas company, a mortgage to secure the payment of money, and that the plaintiffs are the successors in interest of that corpora-

tion, and, as such, are entitled to redeem. They claim this right by virtue of the execution sale on the Basche judgment, but, unless that sale operated to transfer the interest of the gas company in the property in controversy to the purchaser thereat, the plaintiffs have no such right. If Parker holds the title to the property as the mortgagee of the gas company, it probably has a right to redeem from him, but no other person can exercise that right unless as its successor in interest. Now, from the allegations of the bill it appears and is admitted that no attempt was ever made to sell or convey, by sheriff's deed, the property in controversy, or any interest therein; but an entirely different tract of land is described throughout the entire proceedings, and hence the alleged sale is absolutely void, and conveys no title whatever if it be conceded that an equitable interest in real estate is subject to sale under execution. Nor can a court of equity correct mistakes of this kind in proceedings to enforce judgments at law. The rule of *caveat emptor* applies with all its rigor to such sales. In the absence of fraud, the buyer must look out for himself. He is presumed to purchase with his eyes open, and with full knowledge of the proceedings upon which the validity of his title must depend. The law requires the performance of certain conditions before the title of one person can be involuntarily transferred to another, and a court of equity has no more power than a court of law to dispense with any of them. This being so, it is manifest that the purchaser at the execution sale under the Basche judgment acquired no title whatever, either legal or equitable, to the prop-

erty in controversy; and, of course, the successor in interest of such purchaser could be in no better position. It follows, therefore, that plaintiffs do not show by their alleged cross bill such a state of facts as entitles them to redeem from the Parker mortgage, and hence the court did not err in sustaining the motion to strike out the cross bill. It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

[Argued June 22; decided July 26, 1897.]

MORRIS v. TAYLOR.

(49 Pac. 600.)

1. **MUNICIPAL CORPORATIONS—LIMIT OF INDEBTEDNESS.**—The indebtedness of a city is not increased by the issue of bonds in place of outstanding warrants against the city which are to be taken up by the bonds issued.
2. **POWER OF MUNICIPALITY TO ISSUE BONDS.**—A city which has express power to borrow money for municipal purposes and issue or dispose of negotiable or other municipal bonds may issue bonds in lieu of and for the purpose of funding its floating indebtedness.

From Clatsop: THOMAS A. McBRIDE, Judge.

Application by Morris & Whitehead, a corporation, for a writ of mandamus compelling Frank J. Taylor, mayor of the City of Astoria, and others, to execute and deliver to the applicant certain municipal bonds. From a judgment denying the application, said applicant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Ralph E. Moody*.

For respondent there was a brief and an oral argument by *Mr. Frank J. Taylor, in pro. per.*

Opinion by MR. JUSTICE BEAN.

In April, 1897, the City of Astoria, having a bonded indebtedness of \$100,050, and a floating indebtedness, represented by warrants owned by the plaintiff, of \$90,000, passed an ordinance providing for the exchange of negotiable twenty-year bonds of the city, bearing semiannual interest at the rate of 6 per cent. per annum, for said warrants. By this ordinance it was provided that the bonds should be deposited with the city treasurer, and by him kept in a safe place until such time as the plaintiff, or its duly authorized agent, should deliver to him any of the warrants in lieu of which the bonds were to be issued, when he should deliver to it or its agent bonds equal in amount to the sum then due on the warrants so surrendered, and continue to deliver bonds, as fast as warrants were surrendered to him, until the contemplated exchange should be completed, and that the warrants so surrendered should be immediately canceled. A question having subsequently arisen as to whether the city, under its charter, had such authority to issue such bonds, and the officers thereof having refused to execute or deliver them, this action was instituted to test that question; and, a *pro forma* judgment having been entered in favor of the city officers, the plaintiff brings this appeal.

1. Two questions are presented by the record: *First*, whether the issue of such bonds is violative of the charter, which provides that the indebtedness of

the city shall never exceed in the aggregate the sum of \$200,000, and that any debt or liability incurred in excess thereof, except certain specified indebtedness, not necessary to be here mentioned, shall be null and void and of no effect; and, *second*, whether the provisions of the charter authorizing the city "to borrow money on the faith of the city, or loan the credit thereof, or both, for purely municipal purposes, and to issue or dispose of negotiable or other municipal bonds with interest coupons attached," empowers it to issue negotiable bonds for the purpose of funding its outstanding indebtedness. The first question seems easy of solution. By the express provisions of the ordinance, the bonds shall only be issued to a holder of the outstanding warrants in exchange and as a substitute therefor, so that the aggregate indebtedness could not be thereby increased in any way, but the transaction would simply operate as an exchange of one evidence of indebtedness for another, without increasing the amount thereof.*

2. The other objection to the validity of the proposed bonds is based upon the proposition that a municipal corporation, without explicit authority, cannot lawfully issue negotiable bonds for the purpose of funding its floating indebtedness; and, while this question is not by any means free from doubt, we are inclined to the opinion, from a careful review of the authorities, that when a municipality has the express power to borrow money for municipal purposes, and

* NOTE.—On this subject and to the same effect see these cases: *Doon Township v. Cummings*, 142 U. S. 366 (12 Sup. Ct. 221); *Bannock County v. Bunting*, (Idaho) 37 Pac. 277; *State ex rel v. McGraw*, 12 Wash. 440 (41 Pac. 898).—REPORTER.

to issue or dispose of negotiable or other municipal bonds, it may, under such power, issue bonds in lieu of, and for the purpose of funding, its floating indebtedness. Such seems to be the rule deducible from the following authorities: *Simonton on Municipal Bonds*, § 125; *City of Quincy v. Warfield*, 25 Ill. 279; *City of Galena v. Corwith*, 48 Ill. 423; *Village of Hyde Park v. Ingalls*, 87 Ill. 13; *Rogan v. City of Watertown*, 30 Wis. 259; *Town of Solon v. Williamsburgh Savings Bank*, 114 N. Y. 122 (21 N. E. 168); *Portland Savings Bank v. City of Evansville*, 25 Fed. 389; *Commonwealth v. Councils of Pittsburgh*, 41 Pa. St. 278. An analysis or review of these cases or any further discussion of the question must be dispensed with, in view of the limited time at our disposal. The judgment of the court below is reversed and the cause remanded, with directions to issue the peremptory writ of mandamus as prayed for.

REVERSED.

[Argued April 22; decided July 26, 1897.]

FOWLER v. FOWLER.

(49 Pac. 586.)

LIABILITY OF HUSBAND FOR WIFE'S SUPPORT.—In a proceeding under Laws 1889, p. 92, to compel a husband to contribute to his wife's support, the wife, if living apart from her husband, must allege and prove that the separation is without her fault, and that he has, without just cause, neglected or refused to support her.

From Multnomah: ALFRED F. SEARS, Judge.

Suit by Edith Fowler against her husband, Joseph Fowler, to compel him to contribute to her support. There was a decree for plaintiff.

REVERSED.

For appellant there was a brief by *Mr. A. King Wilson*.

For respondent there was a brief by *Messrs. Stott, Boise & Stout*.

ON REHEARING.*

Opinion by MR. JUSTICE BEAN.

The statement in the original opinion, that the record affirmatively shows that all the testimony in the case is not here is an error into which the court was led by a statement of one of the counsel, made at the opening of the hearing, and noted by the stenographer. From the certificate of the trial judge, however, to which our attention has been called by this petition, it appears that the record before us does contain "all the evidence in the case," and it will therefore be necessary to ascertain whether it is sufficient to support the order. The act of the legislature upon which the proceeding is based provides "that it shall be lawful for any married woman to apply to the circuit court of the county in which she resides for an order upon her husband to provide for her support and the support of her minor children, if any, by said husband living with her," and that "if it shall appear to the court, after hearing the parties, that said husband is able to support or contribute to the support of his wife and said children, if any, and that he neglects or refuses to perform his duty in that respect," it shall

*NOTE.—The first opinion herein was for affirmance because not all the testimony was in the record. That, however, is not now in force, and by direction of the judges it is omitted from the official reports as not relating to a matter before the court.—REPORTER.

have power to make such decree as to her support as shall be equitable, in view of the circumstances of both parties: Laws 1889, p. 92.

In her petition the plaintiff avers that she is living separate and apart from defendant, and that such separation is without fault on her part; and this was a material issue in the case. To entitle a wife living separate and apart from her husband to prevail in a proceeding under this statute, she must not only allege, but must show by competent evidence, that the separation is without her fault, and that the husband has, without just cause, neglected or refused to support her. The statute was not designed to change the rule of the common law as to the liability of the husband for the support of his wife living apart from him. It was intended to give her a remedy directly against him, instead of having it worked out through some third person, as it had to be at common law. But it is only in cases where the husband could be compelled at common law to pay for necessities furnished his wife, living separate and apart from him, that she is entitled to an order for support under this statute. In either instance she must have a just cause for the separation. The husband's duty to support his wife is conditioned upon her not breaking up the marital relation without his fault or consent, and therefore, if she is living separate and apart from him, she must allege and prove that the estrangement is without her fault, before she can compel him to contribute to her support, under the provisions of the statute: Bishop on Marriage and Divorce, §§ 1223, 1228; *Weigand v. Weigand*, 41 N. J. Eq. 202 (3 Atl. 699); *Anderson v.*

Anderson, 45 Ill. App. 168; *Jenkins v. Jenkins*, 104 Ill. 134; *People v. Naehr*, 30 Hun. 461. Now, in this case, there is not a particle of evidence in the record showing or tending to show that the petitioner is justified in living apart from her husband. It appears therefrom that she and her husband were married September 24, 1874, and still are husband and wife, and have no children; that, since the hearing on a former petition for support filed by the plaintiff, the defendant has not requested the plaintiff to live with him, and has made no provision for her support or maintenance, although requested to do so; that she has no means of support, and is unable to work. And this is the substance of all the evidence in the case, and wholly fails to show that the separation is without the fault of the petitioner. It is true, the court finds that she is without fault, but this finding is not supported by the evidence; and whatever knowledge or information the court may have had in relation to that matter, derived from evidence produced in former proceedings between these same parties, could not be used to support the judgment or order in this particular case, unless in some way made a part of this record. It follows from what has been said that the order from which this appeal is taken is erroneous, and must be reversed.

REVERSED.

[Decided at PENDLETON, July 31, 1897.]

PERKINS v. McCULLOUGH.

(49 Pac. 861.)

1. **EVIDENCE OF SALE.**—An alleged division of property held in the name of a husband, made between him and his wife, because she had helped earn it and acquired an interest therein, testified to by the wife, when there is neither written evidence of such transfer nor change of possession, is not sufficient proof of a sale to her, when her testimony is contradicted by the husband.
2. **EQUITY — FRAUDULENT TRANSFER.**—Where an owner of property made a lease thereof in the name of his wife to defraud creditors, she did not thereby acquire title; and hence the rule that equity will not lend its aid to a seller of personal property transferred in fraud of creditors, when he seeks to recover it, does not apply in a suit wherein the husband asserts his title.
3. **BONA FIDE PURCHASER.**—A father who accepts from his daughter, with notice, a bill of sale covering property that belonged to her husband, and which had been leased to a third party in her name for the purpose of defrauding the husband's creditors, is not a bona fide purchaser when the only consideration was board for herself and child and money already advanced for incidental expenses.

From Umatilla: STEPHEN A. LOWELL, Judge.

Suit by R. S. Perkins against B. F. McCullough, W. H. Babb, and others for rescision of a contract and for an accounting.

The cause of suit stated herein is, briefly and in substance, as follows: On May 1, 1893, McCullough, one of the defendants, and Mrs. Hannah N. Babb were joint owners of some three hundred head of cattle and two hundred head of horses, then upon the range in the Big Bend Country, in the State of Washington, and upon the date named they entered into an agreement, by the terms of which Mrs. Babb let and leased to McCullough all said cattle and horses for a term of five years, and, among other things, agreed that each

should be entitled to one-half the proceeds of sales thereof made during the term of the lease. McCullough received and took possession of the cattle and horses in accord with the agreement, and sold and disposed of many of them, but has refused, and still refuses, to account to Mrs. Babb or her successor in interest for any of the property so sold and disposed of, and is now threatening to dispose of the entire property and appropriate the proceeds to his own use. On January 31, 1895, the plaintiff purchased of Mrs. Babb all her interest in the stock, and all claims and demands against the said McCullough arising out of said agreement, but plaintiff is unable to obtain a settlement with McCullough, who refuses to recognize his ownership or right to demand a settlement. About two hundred head of the cattle have been brought into Umatilla County, Oregon. W. H. Babb and W. F. Matlock are made parties, and, it is alleged, are conspiring with McCullough to deprive plaintiff of his rights in and to the property. Zoeth Houser, who is sheriff of Umatilla County, is also made a party. The prayer is that the agreement of leasing be rescinded, and for an accounting and a division of the property and proceeds arising from any sales thereof theretofore made. Babb and McCullough claim to be the owners of the cattle, Matlock claims the right to subject them to sale under an execution against the property of Babb, and Houser justifies under the writ. The court below dismissed the complaint, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *John C. Leasure* and *Stillman & Pierce*, with an oral argument by *Mr. Leasure*.

For respondents there was a brief and an oral argument by *Messrs. James H. Raley* and *John J. Balleray*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The following facts have been proven: On December 16, 1893, W. H. Babb and McCullough were, and had been since prior to May 1 of that year, joint owners of the cattle in question. McCullough had formerly held a lease of them from Babb, which had expired on the date last named. On the said sixteenth day of December Babb procured Hannah N. Babb, who was then his wife, to enter into a contract of leasing with McCullough, by the terms of which the said Hannah N. Babb, in purport, let and leased the cattle to McCullough for a period of five years, commencing with May 1, 1893. The lease contained the following stipulation, among others, viz: "In fulfillment hereof, and consideration of the proper observance of the covenants and agreements herein contained, and by the said second party (McCullough) to be kept and performed, that she, the first party (Hannah N. Babb), will on the first day of May, 1898, deliver over to said second party, as his individual and exclusive property, by instrument or otherwise, as he may direct, one-half of all said original cattle * * * then surviving, and one-half of all increase, * * * retaining the other one-half as her own individual and

exclusive property." At the time this lease was executed, W. H. Babb was heavily involved, he then owing the defendant, Matlock, about \$1,700, the Pendleton Savings Bank \$4,000, and divers sums to other persons; and it was for the purpose of misleading and deceiving these creditors, and hindering and delaying them in the collection of their just demands, that he procured the lease to be made in the name of his wife. Mrs. Babb was fully cognizant of his purpose, and lent her name to the scheme with a view of furthering the purpose and promoting the scheme. On the thirty-first day of January, 1895, Mrs. Babb gave the plaintiff herein, who is her father, a bill of sale of the cattle, which purports on its face to be in consideration of \$7,000, and on the same date, by indorsement, assigned, transferred, and set over to him all her right, title, and interest in and to the lease; and on July 6, following, he, by employment of the same language, reassigned the lease to her. In so far as there is any written evidence, those several instruments constitute the sum and substance of plaintiff's title. Now it is claimed by plaintiff that within a few days after the last assignment there was a verbal agreement or understanding between him and his daughter to treat it as not having been made, and that such assignment was thereby rescinded and the plaintiff reinvested with the lease; and, in further establishment of the plaintiff's title, it is claimed that prior to all these transactions, in the spring or fall of the year 1892, Mrs. Babb and her husband had a division of their property, and that in such division these cattle fell to Mrs. Babb, and that Babb thereupon transferred and

delivered them to her, and that she owned them ever since, up to the time of their transfer by said bill of sale, and that the plaintiff is a bona fide purchaser from her for value.

Let us see if these claims are well founded, as measured by the proofs. Prior to the year 1892, Babb had accumulated considerable property, consisting of a couple of tracts of land situate in Umatilla County, Oregon, of the probable value of \$17,500, and a band of cattle and horses then upon the ranges in Umatilla and in Douglas County in the State of Washington, worth perhaps \$7,000 or \$8,000. Mrs. Babb testifies that, as the wife of Babb, she had helped to earn this property, and thereby acquired an interest therein, although it was all in her husband's name; that in the spring or fall of the year 1892—she could not be definite—she and her husband talked over the matter and it was understood and agreed between them that Babb should take the land and she the stock. There was no bill of sale or other written transfer of the stock, nor was there any delivery of possession. When asked what she did to take possession, she answered, "I simply said they were mine." Subsequently to the alleged transaction the stock were managed by Babb, the same as before; he paying the taxes upon them, disposing of portions of them from time to time, and purchasing other stock and adding to the herd, all without accounting to Mrs. Babb for a single transaction. Mrs. Babb further testifies that the land was deeded to her by Babb at the same time that she made the lease to McCullough of the cattle. On February 22, 1895, she wrote her son Willie: "I

have put all the cattle, horses, and land in pa's name, so, if I can't raise the money by June, they can take nothing but the land." On July 6, the same date that the plaintiff reassigned and transferred the lease to Mrs. Babb, he also redeeded to her the land; and on July 18, Mrs. Babb, in turn, deeded the land back to Babb, with a letter written by her to Babb of that date and directed to him at Chicago, and inclosed the two deeds and the lease containing the indorsement of herself and plaintiff, all which he received in due course of the mails. She and plaintiff both testified that the consideration for the sale of the stock by her to plaintiff was \$7,000, but further examination disclosed the fact to be that no money was paid at the time, but that she and her child had been living with the plaintiff about a year and a half prior thereto, and that he had been furnishing her money from time to time as she needed it for clothing and incidental expenses; it being estimated that she owed him for these accommodations in the neighborhood of \$1,200. This was to be turned in as part payment, and he was to continue to board and clothe her and her child, and the final payment was to be made "when the horses and cattle were rounded up and sold." Perkins says he bought the property in good faith, believing it to belong to Mrs. Babb. Touching the retransfer of the lease by plaintiff to Mrs. Babb, she testified as follows, in answer to the interrogatories propounded to her: "Q. Didn't he transfer the horses and cattle back to you at the same time he transferred the land? A. He did. Q. Signed the lease as appears therein on the back of it? A. He did. Then afterwards we talked it over,

and I said, 'Father, hold the bill of sale, and run the stock just the same as if it was sold.' Q. Why did you have Mr. Perkins make that indorsement on the lease and turn this property back to you? A. After I deeded the farm back to Mr. Babb, he thought he would deed the stuff back to me; and, after I considered the matter, I said: 'No; you keep the stuff, and run it for me, as I cannot run it myself.'" W. H. Babb flatly contradicts his wife touching a division of the property and a sale or transfer of the stock to her, —either of the title or possession; and, from the inherent weakness of her own testimony, we conclude that Mrs. Babb never at any time obtained or held the title to any of the cattle in controversy, or any interest therein.

2. The fact that she entered into a scheme with Babb to defraud his creditors, and permitted the use of her name, whereby she apparently leased the cattle, or an interest therein, to McCullough, did or could not, under any principle that we are aware of, have the effect to transfer or convey title from Babb to her. We do not understand that it was seriously contended at the argument that the leasing, in the manner in which it was intended to be accomplished, had that effect, but the main reliance was placed upon the alleged prior division of property and transfer of the stock. The proof, however, does not support the contention, as we have seen. It was sought, as against Babb, to invoke the familiar doctrine that a court of equity will not lend its aid to a vendor of personal property to recover it back when it has been transferred in fraud of creditors, but will leave the parties where it finds

them. The result of the authorities is concisely stated in Bennett's American Notes to Benjamin on Sales (6th ed.) p. 456 as follows: "The vendor cannot rescind and retake the property, nor can the vendee refuse to pay, or recover back what he has paid." This rule, as it pertains to real property, received the sanction of this court in *Bradtfeldt v. Cooke*, 27 Or. 194 (50 Am. St. Rep. 701, 40 Pac. 1). But the rule can have no application here; for, as between Babb and his wife, she never was the owner of the property which Perkins is now seeking to recover, and Babb's defense of his title is not an attempt to reinvest himself with a title transferred in fraud of creditors.

3. The plaintiff invokes another principle, and that is that Babb, having clothed his wife with the apparent title or power of disposition of the property, whereby other parties were induced to deal with her upon the supposition that she was the real owner, and Perkins having purchased from her, *bona fide* and for value, without notice, Babb is now precluded and estopped to dispute the title, as against him. Such is the doctrine of *Velsian v. Lewis*, 15 Or. 549 (3 Am. St. Rep. 184, 16 Pac. 631.) It is there said, in substance, that the rights of such a purchaser do not depend upon the actual title or authority of the person with whom he deals, but are derived from that act of the real owner which precludes or estops him from disputing, as against such purchaser, the existence of the title or power which he caused or allowed to appear vested in the party making the sale. But Mr. Perkins is not an innocent purchaser for value. In the first place, he knew perfectly where the title to the cattle

was vested, and the purpose for which they were leased to McCullough in the name of his daughter, then the wife of Babb; and, in the second place, he parted with no value at the time of the pretended purchase from his daughter; and, furthermore, his subsequent dealings with the property would not indicate that he ever seriously considered that he at any time possessed any real interest in it. All the conditions of acquiring title by estoppel, as against Babb, are entirely wanting, so that the principle invoked cannot avail the plaintiff. This consideration disposes of the case, as it leaves Perkins without any sort of title upon which to maintain his suit. The question touching the reassignment of the lease, and the subsequent consideration of the parties respecting such assignment, and other questions made in the briefs and at the argument will therefore not be passed upon. Let the decree of the court below be affirmed.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

STATE *ex rel.* v. LAVERY.

(49 Pac. 352.)

1. PRESUMPTION—DECREE.—It will be presumed that a decree followed the allegations and prayer of the complaint on which it was based, when the records are lost.
2. CONTEMPT—VIOLATING INJUNCTION.—One who has been enjoined by a decree from diverting the waters of a creek or its tributaries is guilty of contempt of court when he directs others to divert water from such tributaries, although he believed that the decree was invalid so far as it pertained to these streams.
3. AMENDING AFFIDAVIT OF CONTEMPT—VERIFICATION.—An affidavit being necessary as the basis of proceedings for contempt for acts not committed in the presence of the court (Hill's Ann. Laws, § 653), an

amendment of such affidavit must be accompanied by a verification thereof: *State v. Kaiser*, 20 Or. 50, cited.

4. CONTEMPT—KNOWLEDGE BY STRANGER.—A stranger to an injunction, if he has notice or knowledge of its terms, is bound thereby, and may be punished for contempt if he violates its provisions; but the rule is otherwise where the stranger was unaware of the terms of the restraining order.

From Malheur: MORTON D. CLIFFORD, Judge.

This is a special proceeding for the punishment of an alleged contempt, said to have been committed by John Lavery and Daniel Lavery in violating the terms of a certain decree. The material facts are that, a suit having been commenced in the Circuit Court of Malheur County by the relator and others to enjoin the defendant, Daniel Lavery, from diverting the waters of Warm Spring Creek, in said county, issue was joined and testimony taken, from which the court on October 10, 1891, found, in substance, that the plaintiffs were the owners of certain premises through which said creek flowed, and that in 1883 they diverted all the waters thereof, and appropriated the same in irrigating their lands; that in May, 1891, the defendant erected a dam in the channel of said creek, and constructed a ditch therefrom, by means of which he diverted said waters, and deprived plaintiffs of the use thereof, to their damage in the sum of \$25. As a conclusion of law the court also found that plaintiffs were entitled to a decree perpetually enjoining the defendant from interfering with the waters of said creek, and thereupon decreed "that defendant, Daniel Lavery, his agents, servants and employees, and all persons claiming by, through, or under him, be, and they are

hereby, perpetually restrained and enjoined from in any manner interfering with the waters of said creek, or the tributaries thereof, above the lands of plaintiff." The relator, in November, 1896, filed in said court his affidavit wherein he charges the defendants with violating the provisions of said decree by appropriating to their own use during the months of April, May, June, and July, 1896, a portion of the waters of Warm Spring and Jerry Creeks, and all the waters of Bendi-er Creek,—the two latter being tributaries of Warm Spring Creek, situate above the head of affiant's ditch, and an attachment was issued thereon, in pursuance of which the defendants were apprehended. Upon being brought before the court, they entered pleas of not guilty, whereupon a trial was had, resulting in their conviction, and, being sentenced to pay a fine of \$25 each, they appeal from the judgment thus rendered.

MODIFIED.

For appellants there was a brief and an oral argument by *Mr. Charles H. Finn*.

For respondent there was a brief over the names of *King & Saxton*, and *Charles H. Parrish*, district attorney, with an oral argument by *Mr. Will H. King*.

MR. CHIEF JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

It is contended that the issues upon which the decree is predicated involved the right to appropriate the waters of Warm Spring Creek only, that the right to

apply the waters of its tributaries to a beneficial purpose was not litigated, and that the decree, in so far as it pretends to restrain the defendants from appropriating any of the waters of Jerry or Bendier Creeks, is void, and hence they are not in contempt, as charged by the relator. Disobedience of any lawful judgment, decree, order, or process of the court is deemed to be a contempt of the authority of the court: Hill's Ann. Laws, § 650, subd. 5. Under this statutory definition, it is apparent that two important questions are presented for consideration: Is the decree rendered by the Circuit Court of Malheur County lawful? And, if so, have the defendants knowingly violated its provisions? The original complaint made no mention of any of the tributaries of Warm Spring Creek, and the amended complaint was lost prior to the trial of this proceeding. While it is a principle of law that a prior appropriation of the waters of a stream flowing through public lands of the United States embraces, when necessary to supply the demands of such appropriator, all the waters of springs and tributaries above the ditch by which the stream is supplied (*Low v. Schaffer*, 24 Or. 239, 33 Pac. 678), yet it must be conceded that an appropriation from a tributary may be prior in time, and hence superior in right, to an appropriation from the main stream, so that an adjudication that a proprietor has no right to appropriate the waters of the main stream does not necessarily determine that he has no right to any of the waters of the tributaries thereof.

1. The court having enjoined the defendant, Daniel Lavery, from diverting the waters of any of

the tributaries of Warm Spring Creek above plaintiff's premises, and the amended complaint upon which the decree is based having been lost, the question is presented whether it will be presumed from a mere inspection of the decree, when uncontradicted by the pleadings, that it was warranted by the allegations and prayer of the bill. It does not follow from the absence of a denial in the answer that plaintiffs had made a prior appropriation of the waters of Bendier and Jerry Creeks, that the amended complaint did not contain averments to that effect; for it may be that the defendant, being unable to controvert such an allegation, for that reason failed to deny it, thereby admitting its truth: Hill's Ann. Laws, § 94. A decree in a suit before a court of this state having jurisdiction to pronounce the same is conclusive between the parties and their representatives and successors in interest by title subsequent to the commencement of the suit: Hill's Ann. Laws, § 733. Mr. Justice Woods, in *United States v. Debs*, 64 Fed. 724, in discussing the liability of a party to an injunction for violating its provisions, says: "If the injunction was for any reason totally invalid, no violation or disregard of it could constitute a punishable contempt; but if the court acquired jurisdiction, and did not exceed its powers in the particular case, no irregularity or error in the procedure or in the order itself could justify disobedience of the writ." See, also, *In re Cohen*, 5 Cal. 494; *Moat v. Holbein*, 2 Edw. Ch. 188; *Sullivan v. Judah*, 4 Paige, 444; *People v. Bergen*, 53 N. Y. 404; *Stimpson v. Putnam*, 41 Vt. 238. The court

having jurisdiction of the subject-matter and of the person of the defendants in the case at bar, it was authorized to pronounce the decree; and, no appeal therefrom having been taken, it must be presumed, as against Daniel Lavery, in the absence of the amended complaint, that the decree followed the allegations and prayer thereof: *Treat v. Maxwell*, 82 Me. 76 (19 Atl. 98).

2. In *Neale v. Osborne*, 15 How. Prac. 81, having become the owner of a store building under lease to plaintiff, the defendant commenced to tear it down, whereupon an injunction was issued restraining the demolition, after the service of which the defendant's partner, one Bissell, with the knowledge and consent of its owner, continued the destruction of the building. The defendant, having been attached for contempt, sought to avoid liability by showing that, notwithstanding he was daily present and saw the work of removal as it progressed, hired some of the hands, and confessedly paid half of the expense, had his teams at the scene of demolition removing the material, half of which belonged to him, he was merely passive, while his partner, who was not a party to the injunction, violated its terms. The court, reviewing these facts, say: "It is the veriest of trifling to say, under these circumstances, that Bissell did the wrong, and the defendant is not responsible. He was present, aiding, abetting, advising, assisting, and directing. The work was not done by Bissell without his active concurrence and participation. It may be, if the defendant had been away, and was in no way privy to the work of tearing down the building, that he might not be responsible in this proceeding for the acts of

Bissell. But to allow the defendant to escape responsibility in this case by throwing the blame upon Bissell, and making him the scapegrace for violating this injunction, would be to connive, on the part of the court, at a most palpable disregard of its process,—at the complete and perfect evasion of an injunction deliberately granted.” See, also, *Wheeler v. Gilsey*, 35 How. Prac. 139; *Stimson v. Putnam*, 41 Vt. 238; *Poertner v. Russel*, 33 Wis. 193; *Blood v. Martin*, 21 Ga. 127. A proceeding for the punishment of contempt is *quasi* criminal in character (4 Ency. Pl. & Prac. p. 766, and notes); and, such being the case, a plea of not guilty must necessarily put in issue all the material allegations of the affidavit charging the offense complained of; and a finding by the court that the defendant is either guilty or not guilty must be responsive to, and a finding upon, all the issues made by the pleadings. In this case, the court having found Daniel Lavery guilty, the judgment must be affirmed, if there be any evidence tending to support the finding. An examination of the record shows that he leased his farm to his mother, and that his brother John managed the property for her; and it also tends to show that Daniel directed John as to the manner of irrigating it; that a small tract had been sublet to one Frank Burrell, who, desiring to irrigate the same, applied to Daniel for the use of water for the purpose, and the latter directed his brother John to haul material and build a dam in Warm Spring Creek, which was done, and the water thereupon diverted from that stream. Daniel was a party to and bound by the final decree perpetually enjoining him from diverting the waters of Warm

Spring Creek and the tributaries thereof above the head of relator's ditch, of which decree and its terms he had actual knowledge, but claims to have been informed that, in so far as it purported to adjudicate the right to the use of the waters of Jerry or Bendier Creek, it was invalid, because not embraced within the issues made by the pleadings. Without attempting in any manner to obtain a correction or modification of the decree, he seeks to avoid its provisions by this circuitous method, apparently adopted for that particular purpose; but, his brother John and the tenant being in fact his agents, the maxim, "*Qui facit per alium facit per se*," should be invoked, thereby rendering him guilty of the contempt as found by the court.

3. It is contended that the court erred in permitting, over the defendants' objection and exception, the relator's affidavit to be amended by adding thereto the following words, to wit: "And during all the time of the commission of the acts aforesaid said John Lavery was acting under the instructions and in the employ of the said Daniel Lavery,"—which amendment was not sworn to. Unless the contempt is committed in *facie curiæ*, before any proceedings can be taken therein the facts constituting the contempt must be shown by affidavit presented to the court: Hill's Ann. Laws, § 653. In *State v. Kaiser*, 20 Or. 50 (8 L. R. A. 767, 23 Pac. 961), THAYER, C. J., in commenting upon this section of the statute, says: "In proceedings to punish that class of contempts, it is necessary that a proper information should be filed before the court is authorized to act in the matter. Section 653

of the Code, above set out, makes it imperative that the facts constituting the contempt in such cases must be shown by an affidavit presented to the court, etc., before the proceeding can be taken." It is evident that the court erred in thus allowing the amendment without a verification.

4. However, if it be conceded that the court possessed the power to add these words, they are not sufficient to charge John Lavery, who was not a party to nor bound by the decree, with violating its provisions, without alleging that he had knowledge of its terms and conditions. Rapalje on Contempt, par. 20, and cases cited; 4 Enc. Pl. and Prac., p. 778, subd. 4, and notes. It is true, the decree restrains the "defendant Daniel Lavery, his agents, attorneys, and employees, and all persons acting under, by, or through him," etc., but without serving a copy thereof upon the defendant John Lavery, or alleging or proving that he had knowledge of its provisions, he cannot be in contempt for violating its terms. While there is some conflict of authority upon the question of the liability of a person for violating the process of a court, the weight and better reason seem to support the rule that a stranger to an injunction, who has notice or knowledge of its terms, is bound thereby, and may be punished for contempt for violating its provisions. Rapalje on Contempt, par. 47; *Ewing v. Johnson*, 34 How. Prac. 202; *Waffle v. Vanderheyden*, 8 Paige, 45; *United States v. Debs*, 64 Fed. 724. It follows that the judgment rendered against the defendant Daniel Lavery is affirmed, but in so far as it applies to the defendant John Lavery it is reversed,

and the cause remanded to the lower court, with directions to discharge the latter.

MODIFIED.

[Decided at PENDLETON July 31, 1897.]

RE McCULLOUGH'S ESTATE.

MULDRICK v. GALBRAITH.

(49 Pac. 886.)

31	86
40	431
31	86
42	280

ACCOUNTS OF EXECUTORS—EXPENSES OF TRAVEL.—An administrator who, before decedent's death, visited him at his request, is not entitled to charge the estate for his expenses, when no promise of payment by decedent is shown, and the parties were relatives and on friendly terms; but the administrator is entitled to payment for traveling expenses incurred on a visit to the executrix, at her request, to consult as to the proper management of the estate.

IDEM.—A nephew who persuaded his uncle to accompany him on a dangerous trip, and paid his expenses, cannot recover from the uncle's estate the amount of the expenses, although the uncle had agreed to repay them, inasmuch as the uncle went merely to accommodate the nephew and for the latter's increased safety.

ATTORNEY'S FEES.—An item in an administrator's final account of money paid to his attorney for making an inventory may be rejected when such attorney is allowed a gross sum for his services in the management and settlement of the estate.

EXPENSES OF TRAVEL.—An administrator who makes a charge of \$100 against an estate, for expenses incurred and time employed on a business journey connected therewith, and an additional charge of \$30 for making a subsequent trip to the same place, will be allowed but \$60 for both trips, when it appears that the expenses incident to the journey do not exceed \$30.

EXTRA COMPENSATION.—The allowance of extra compensation to an administrator for services rendered in the discharge of his duties is a matter largely within the discretion of the county court (section 1180 Hill's Ann. Laws), and the amount so awarded will not be disturbed on appeal, unless there has been a manifest abuse of discretion, or the amount so allowed is disproportionate or not equivalent to the services performed: *Steel v. Holladay*, 20 Or. 462, applied.

POWER OF EXECUTOR TO CONTRACT FOR ATTORNEY'S FEES.—One who is acting in a representative capacity cannot bind the estate over which he has control except for expenses of protecting it or by statutory authority. Within this rule an administrator may, under section 1178,

Hill's Ann. Laws, allowing reasonable attorney fees for necessary litigation, contract with an attorney to undertake litigation for a liberal fee contingent on success.

ATTORNEY'S FEES AGAINST ESTATES.—An attorney may be allowed his expenses necessarily incurred in travel for the estate which he represents, and a gross sum for all his services. This method of fixing compensation is preferable to allowing claims for different services as they are performed. It is desirable, too, that as few attorneys should be employed as is consistent with the amount and condition of the estate—ordinarily one is sufficient.

From Grant; MORTON D. CLIFFORD, Judge.

This is a dispute over the final report of W. J. Galbraith as administrator in Oregon of the estate of his uncle, John McCullough.

The facts are that on June 11, 1894, John McCullough died testate, leaving an estate in Washington County, Idaho, of the probable value of \$100,000; and, his last will and testament being admitted to probate in that county, Rebecca J. McCulloch, his widow, was appointed, and thereupon duly qualified, as executrix thereof. The deceased also left an estate in Grant County, Oregon, and on October 14, 1894, the county court thereof appointed W. J. Galbraith administrator, with the will annexed, and he thereafter duly qualified as such. The assets of the estate in the latter county consisted principally of a debt due from one John Muldrick, who, as the financial agent of the deceased in his lifetime, had received large sums of money to the use of his principal, but upon Galbraith's appointment Muldrick informed him and the persons who were appointed appraisers that he was not indebted to the estate, but that it owed him about \$3,000. Galbraith thereupon employed Thornton Williams as his attorney, and together they went to Weiser, Idaho, to

consult with the executrix in relation to the matter, and, after examining the books of account kept and other memoranda left by the deceased, as well as letters written to him by Muldrick, acknowledging the receipt and collection of certain sums of money to the use of the deceased, an action was commenced against Muldrick by Galbraith in his representative capacity to recover the sum of \$31,450.92, the amount claimed to be due from Muldrick to the deceased, as ascertained from an inspection of the books, letters, etc. Muldrick, after denying the material allegations of the complaint, averred in his answer that he had an accounting and settlement with the deceased, upon effecting which there was found to be due to the latter the sum of twenty-five cents, which he then paid, and thereafter the deceased became indebted to him in the sum of \$2,989.64, for which he prayed judgment against the estate. The reply having put in issue the allegations of new matter contained in the answer, a trial was commenced, and, after Galbraith had introduced his evidence, and rested, a stipulation was entered into under the terms of which a judgment for the sum of \$10,000 was rendered against Muldrick. Galbraith, having fully administered the estate under his charge, filed his final account, showing that he had collected the sum of \$10,373.99; that he had paid out a portion of this amount in the discharge of his duties, and, having a certain sum on hand, prayed that it might be applied to the payment of his charges and expenses as administrator, including the claims of Thornton Williams as his attorney, and that the remainder might be paid to the executrix.

Margaret Wood and Jennie Muldrick, heirs of the deceased, filed objections to certain items contained in this final account, to which Galbraith answered, showing the reasonableness of said charges, and, a reply to the answer having been filed, the cause was referred to W. J. Coleman, who took and reported the evidence, from which the county court made its findings upon the matters in issue, and rejected the following items of the account: (1) To expenses incurred by Galbraith on a journey from Canyon City, Oregon, to Weiser, Idaho, and return (several items), \$24.05. (2) To amount paid by Galbraith for lumber at the request of the deceased, \$265. (3) To two trips to Weiser prior to his appointment as administrator, \$120. (4) To expenses of McCullough on a journey to Cœur d'Alene, paid by Galbraith, \$100. (5) To advice from and service by Thornton Williams in making the inventory, \$25. Upon the remaining items to which objections were made the court allowed them in part only as follows: (6) To expenses and time of Galbraith on a trip to Weiser with Williams, \$100, and another trip there after witnesses, \$30, total for the two trips, \$130; amount allowed, \$60. (7) To additional compensation for extra services as administrator, \$500; allowed, \$50. (8) To trip to Weiser by Williams, advice and service in preparing statement of claim against Muldrick, filed with inventory, \$250; \$60 allowed. (9) To services rendered in procuring evidence and conducting the trial in the action of Galbraith against Muldrick, \$2,500; \$1,000 allowed. (10) To services in settling up the estate, \$400; amount allowed, \$100. The final account was there-

upon approved with these exceptions, and it was decreed that the administrator should be discharged upon his payment to the executrix of the sum of \$8,303.38, which he then had on hand. From this decree the administrator and said heirs appealed to the circuit court, which found, as to the ninth item, that the sum of \$150 had been paid by the administrator to local attorneys as their fees in the trial of the case of Galbraith against Muldrick, and thereupon reduced the amount so awarded to Williams to \$850, thereby increasing the amount to be paid to the executrix, but otherwise affirmed the decree of the county court, and from this latter decree the administrator appeals to this court.

MODIFIED.

For appellant there was a brief and an oral argument by *Mr. James A. Fee*.

For respondent there was a brief and an oral argument by *Messrs. Chas. A. Sweek and Milton W. Smith*.

MR. CHIEF JUSTICE MOORE, after making the foregoing statement, delivered the opinion of the court.

The only questions presented for consideration by this appeal are whether the items contained in the final account of the administrator to which objections have been made are proper charges against the decedent's estate in Grant County, and, if so, are they reasonable in amount? Considering the items objected to in their order as numbered, it appears that the county court allowed on account of the sixth item the sum of \$30 per trip as expenses by Galbraith in mak-

ing the journey from Canyon City, to Weiser, Idaho, and return, and, as the first item of \$24.05 is apparently embraced in that allowance, we think said first item was properly rejected.

The deceased being the owner of a tract of land in Grant County, Galbraith, at his request, purchased for him a quantity of lumber to build a house thereon, paying therefor the sum of \$265; but, the deceased having given this land to Galbraith, who was his nephew, and executed a deed to him therefor, the house was not erected, and, the lumber having been considerably damaged, Galbraith, after his appointment as administrator, sold it for the sum of \$80. Jennie Wood, a niece of the deceased, having been called as a witness on behalf of the objectors, in answer to a question as to what statements she had heard John McCullough make in regard to the lumber in question, said: "I have heard my uncle say a number of times that he never ordered any such bill of lumber." Galbraith, however, testified that after he had ordered the lumber, in pursuance of McCullough's request, the latter, thinking the house would be too large, and cost more than he desired to expend in its construction, objected to the size of the material, but, after inquiring as to the size and probable cost of a house in the vicinity, he concluded to accept the lumber, and it was thereupon hauled to and stacked in a shed on the premises. Comparing the testimony of Jennie Wood with that of Galbraith, the reason for McCullough's statement, as testified to by her, is apparent, and, while the deceased may never have ordered such a bill of lumber, he did ultimately ratify the order as given by Galbraith, and,

such being the case, we think it conclusively appears that the estate is liable for the cost of the material, and should be credited with the amount received on account of the sale thereof.

Galbraith made two trips to Weiser prior to his appointment as administrator, the first at the request of the deceased, and the second at the suggestion of the executrix, for which he charges the estate \$120. It does not conclusively appear that McCullough promised to pay his nephew anything for making the first journey, and, in view of the relation existing between them, we think the county court properly rejected that part of the third item; but we believe Galbraith is entitled to the sum of \$30 on account of the trip he made at the suggestion of and to consult with the executrix as to the proper management of the estate.

It appears that Galbraith's brother was murdered at Cœur D'Alene, and, desiring to visit that place to look after his brother's estate, he persuaded McCullough to accompany him, paying the latter's expenses, amounting to the sum of \$100, which McCullough agreed to repay. This journey, in our judgment, was made by McCullough for the accommodation of Galbraith, whose wife objected to his visiting the scene of the killing of his brother unless his uncle accompanied him; and, notwithstanding McCullough agreed to pay his own expenses incurred on the trip, we think they do not constitute a legal charge against his estate, and hence the county court properly rejected the fourth item.

It also appears that the fifth item of \$25, for the services of an attorney in making an inventory, was

disallowed; but, when it is remembered that this charge is made for the attorney employed in the settlement of the estate, we cannot see that any grave error was committed in rejecting it. While it might aid a county court in reaching a proper conclusion as to what would be reasonable compensation for an attorney in the settlement of an estate, and particularly so when the services performed have been rendered by different attorneys, to have each present an itemized account of his part of the work, when it appears that one attorney performed all the services, or was the senior counsel in the management and settlement of an estate, the reason for the course suggested must necessarily cease, and the attorney fee allowed in such case may be a gross sum, measured by the services performed, while taking into consideration the value of the estate involved, as well as the ability of the person by whose counsel and labors the same has been brought to a successful and final settlement.

Examining those items of the final account which were allowed in part only, it appears that Galbraith charges the sum of \$100 for expenses incurred and time employed in making a journey to Weiser, Idaho, while as a part of the same item he charges only \$30 for the time employed in making another trip to that place. The evidence tends to show that the expenses incident to the journey do not necessarily exceed the sum of \$30; and, the county court having allowed \$60 as a reasonable charge for making the two trips, we think no error was committed in modifying the sixth item.

It also appears that Galbraith, having received the

sum of \$352.19 as the commission prescribed by law, demanded the further sum of \$500 as extra compensation for his services as administrator, but the county court allowed on account thereof the sum of \$50 only. The statute, after prescribing the commission which an administrator or executor is entitled to receive, also provides that: "In all cases, such further compensation as is just and reasonable may be allowed by the court or judge thereof, for any extraordinary and unusual services, not ordinarily required of an executor or administrator in the discharge of his trust:" Hill's Ann. Laws, § 1180. The county court, under this provision, after awarding Galbraith the sum of \$60 on account of expenses incurred in making two trips to Weiser, Idaho, also allowed him the sum of \$50 as extra compensation, so that the total so received by the administrator amounted to the sum of \$462.19. The allowance to an administrator of extra compensation for services rendered in the discharge of his duties must necessarily be a matter largely within the discretion of the county court, which, being conversant with the services required, as well as those performed by its appointee, can ordinarily be relied upon to make a fair allowance for unusual services; and, such being the case, the amount so awarded ought not to be disturbed on a review of its acts on appeal, unless it clearly appears that there has been a manifest abuse of discretion, or that the amount allowed was disproportionate, or not equivalent, to the services performed. "The fees provided by statute," says BEAN, J., in *Steel v. Holladay*, 20 Or. 462, (26 Pac. 562,) "are to be deemed ample compensation for an executor, ex-

cept in unusual cases, and when he is required to render extraordinary services not ordinarily required of an executor. His additional compensation, if any, is within the discretionary power of the court to allow; and when a claim is made therefor it should be scrutinized with care, and never allowed unless the court is satisfied that it is just and reasonable." It is true, the administrator instituted an action, and thereby recovered the amount so obtained by him, which furnished the greater portion of the assets of the estate upon which his commission was predicated, and without it his compensation would have been nominal; so that, while he may have been compelled to perform extra duty, we think the county court allowed him a reasonable compensation therefor.

The claim of the administrator on account of the charge of Thornton Williams for \$250, under the eighth item, was reduced by the county court to \$60, no doubt intending thereby to reimburse the attorney for the expenses incurred, and to adjust his compensation under the general claim therefor. This being so, what has hereinbefore been said in discussing the fifth item may apply with equal force to this, and, adopting the rule there announced, we think no error was committed in not allowing a greater sum.

The charge, under the ninth item, for an attorney fee for prosecuting the action of Galbraith against Muldrick, furnishes the principal issue in the case before us. The evidence tends to show that it was quite doubtful, when the action was commenced, whether any sum whatever could be recovered from Muldrick, because it was difficult to say with any degree of cer-

tainty what amounts, if any, he had paid on account of the money received by him to the use of the deceased. In this uncertain condition of affairs, Galbraith entered into a contract with Williams, by which it was agreed that, if the result proved unsatisfactory, he should receive his actual expenses only, but, if he should be successful in the action, and thereby obtain a considerable amount, he was to receive a liberal fee. This agreement presents the question whether its terms can be enforced, and, if so, what is a reasonable attorney fee under the circumstances. The statute provides that "An executor or administrator shall be allowed, in the settlement of his account, all necessary expenses incurred in the care, management, and settlement of the estate, including reasonable attorney fees in any necessary litigation or matter requiring legal advice or counsel." Hill's Ann. Laws, § 1178. That the action against Muldrick was necessary is evident from his declaration that he was not indebted to the estate, and this statement is made more emphatic by his verified answer to the effect that the estate was indebted to him in the sum of \$2,989.64. The administrator, however, could not, under this statute, bind the estate to pay for the services of an attorney any more than they were reasonably worth, for the rule appears to be pretty well settled that a person acting in a representative capacity cannot create a charge against the estate over which he has control, except as specially authorized by statute, or to reimburse himself for moneys necessarily expended in protecting the property intrusted to him: *Weaver v. Van Akin*, 71 Mich. 69 (38 N. W. 677); *Noyes v. Blakeman*, 6 N.

Y. 567. The contract entered into with Williams is, in effect, to pay him what his services were reasonably worth, and, being contingent upon a recovery, the question to be considered is whether the allowance by the circuit court fills the measure of the contract.

In taking the deposition of Hon. H. H. Northup, county judge of Multnomah County, upon that subject, the following question was propounded: "In case the fee was contingent, what, in your judgment, would be a reasonable charge?" To which he answered: "It is usual, where the fee is contingent, for the parties to agree upon the amount to be paid. If, however, it was the understanding that no fee was to be paid unless the plaintiff in the suit was successful, and no price was stipulated to be paid, I would say that \$1,500 or \$2,000 would be reasonable." Further testifying, this witness says: "Of course, it is not possible for me to answer as definitely as I would like to. If the attorney was required to visit different localities, remote from his residence and place of business, and was required to pay his own expenses, of course that would add to the charge that he should make, and the amount he was to be paid. If the understanding was that he was to receive no compensation unless recovery was had, and he was to be well paid in case of recovery, and a recovery of \$10,000 was had, I don't know that \$2,500 would be an excessive fee; but I think that \$2,000 would be a fair compensation. If the estate was before me, I would settle the claim at \$2,000 rather than \$2,500." This witness is corroborated by the testimony of John F. Caples, W. W.

Thayer, ex chief justice of this court, attorneys of the City of Portland, and also by J. C. Moreland, ex county judge of Multnomah County; John J. Balleray and James A. Fee, ex-circuit judges, and by M. Dustin and T. J. Hailey, the latter of whom say that the fees of an attorney in the eastern part of this state are greater than in the City of Portland, and that \$2,500 is not an unreasonable sum to be paid for the services rendered. In view of this evidence, we think the circuit and county courts are in error in fixing the compensation for the services performed in the trial of said action. It is true, the action was not brought to recover unliquidated damages, in which case a large percentage of the amount recovered is usually demanded as attorney's fees; but, while the action involved the recovery of a sum that could be reduced to a mathematical certainty, this amount was uncertain, and must necessarily remain so until Muldrick submitted in evidence the payment he had made on account of the money received by him.

The evidence of the attorneys called as experts tends to show that an attorney employed to settle an estate would probably become more conversant with the facts, and could try an action in which the administrator was a party, cheaper than a stranger to the proceedings; and, this being so, we believe that the sum of \$2,000 affords a reasonable compensation as attorney's fees for the trial of the action and the settlement of the estate. "Where several counsel," says Mr. Woerner in his work on the American Law of Administration (section 515), "are employed, credit should not be allowed for the fees of more than one;" citing

in support thereof the case of *Crowder v. Shakelford*, 35 Miss. 321, in which it appears that, competent counsel having been retained to try a suit, others were thereupon engaged to assist. HANDY, J., rendering the opinion of the court, says: "As to the disallowance of the fees paid in the suits against Mrs. Stokes, it appears that the fee paid one counsel was allowed; and there appears to have been no necessity for the employment of additional counsel, as the cases were not litigated. The claim on this account was, therefore, properly rejected." The rule thus laid down cannot well apply where different attorneys have necessarily been employed to perform separate parts of the service demanded, in which case the fees would be proportionally greater than if the entire service was rendered by the same attorney. In view of this rule, we have considered the sum of \$2,000 as a reasonable compensation for the whole service, and, as there has been paid by the administrator to Parish & Cozad \$25, and to M. Dustin \$150, as attorney's fees, the remainder, or \$1,825, is deemed a reasonable fee for the service performed by Williams; but, having received from the administrator the sum of \$520 on account thereof, there is yet due him the further sum of \$1,305. This is in addition to the payments of \$13 and \$25, respectively, made to him on account of collections of money due the estate, and the sum of \$60 on account of his expenses. The conclusion we have reached renders it unnecessary to pass upon the sum awarded under the tenth item, which is embraced in the amount herein awarded. The decree, in so far as it relates to the attorney fee due Thornton Williams

and the amount to be paid to executrix, will therefore be modified in accordance with this opinion, but in all other respects affirmed.

MODIFIED.

[Decided at PENDLETON, July 31, 1897.]

BURNS v. PAYNE.

(49 Pac. 884.)

31 100
44 527

GARNISHEE IS A "PARTY" TO AN ACTION IN A JUSTICE'S COURT.—A garnishee may appeal from a judgment rendered against him in a justice's court, under Hill's Ann. Laws, § 2117, providing that "either party may appeal from a judgment given in a justice's court," and sections 152 and 163-170, providing that a plaintiff may obtain a personal judgment against a garnishee: *Case v. Noyes*, 16 Or. 329, and *Smith v. Conrad*, 23 Or. 208, applied.

From Baker: ROBERT EAKIN, Judge.

Action by J. R. Burns against Charles H. Payne and David Eccles, garnishee. From a judgment for Eccles, plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *John Bruce Messick* and *Wm. H. Packwood, Jr.*, with an oral argument by *Mr. Messick*.

For respondent there was a brief over the signature of *Johns & Smith*.

Opinion by MR. JUSTICE WOLVERTON.

An action was commenced in the Justice's Court for District No. 1, Baker County, Oregon, by J. R. Burns against Payne, the defendant, and a writ of attachment issued September 19, 1896. Thereupon the writ and a notice of garnishment was served upon

David Eccles, and, his return thereto not proving satisfactory to plaintiff, he was required by the court to appear before it on October 6, 1896, and answer under oath touching his liability to the defendant. Eccles appeared, and answered the allegations and interrogatories served upon him by plaintiff, and when the issues were fully joined a trial was had, which resulted, on November 16, 1896, in a judgment in favor of the plaintiff, and against Eccles, for the sum of \$26.90 and costs, taxed at \$14.25. Prior thereto, to wit, on November 9, judgment had been rendered in the main case in favor of the plaintiff, and against Payne, the defendant, for the sum of \$32.24, and \$13.20 costs. Eccles appealed to the circuit court from the judgment rendered against him in the garnishee proceedings, and a motion was there filed to dismiss the appeal, based upon the ground that no appeal lies from the judgment of a justice's court rendered against the garnishee in such proceedings. This motion was overruled, and, a trial being had, the judgment against Eccles was reversed, and one rendered against the plaintiff for costs and disbursements, from which he appealed to this court, and the sole question presented is the one which arises upon said motion to dismiss the appeal.

It is contended that the statute which gives an appeal from a judgment in a justice's court is not sufficiently comprehensive in its terms to embrace a judgment rendered in a garnishee proceeding, and that it was the intention of the legislature to give an appeal from a judgment in the main case only, or from the one which determines the action, and no other. Section

2117 of Hill's Ann. Laws of Oregon, provides that "either party may appeal from a judgment given in a justice's court, in a civil action, when the sum in controversy is not less than ten dollars," etc. It will be observed, from the wording of this statute, that it is a party to the judgment who may appeal, not a party to the action; but it may be conceded that a party to the judgment must also be a party to the action in order to entitle him to the remedy here prescribed. The statute, under the general code procedure, has provided a remedy by attachment and garnishment, and, in case where the garnishee refuses to give a certificate, or if, when given, it proves unsatisfactory to the plaintiff, it prescribes a mode by which the garnishee may be summoned to appear and answer under oath touching his liability to the defendant, or for any property which he may have in his possession belonging to such defendant and subject to garnishment. Allegations and interrogatories may be served, and, as it pertains to the former, it has been settled that it is essential that they should be filed and served (*Case v. Noyes*, 16 Or. 329, 19 Pac. 104; *Smith v. Conrad*, 23 Or. 206, 31 Pac. 398), and the garnishee is required to file a written answer thereto, to which the plaintiff may reply, thus formulating complete issues between the plaintiff and the garnishee touching his liability to the defendant. Upon these issues trial may be had, as upon ordinary issues of fact between plaintiff and defendant, and judgment rendered against the garnishee and in favor of the plaintiff, with the single restriction that the judgment shall not be for a greater amount than that recovered against the de-

fendant in the action, and execution may issue against the garnishee as upon ordinary judgments. See Hill's Ann. Laws, §§ 152, 163-170, inclusive.

It has also been determined that the proceedings here provided for are at law, as contradistinguished from equity, and that the trial and manner of reserving questions for review in the appellate court are governed by the rules applicable to law actions: *Knowles v. Herbert*, 11 Or. 54 (4 Pac. 126); *Williams v. Gallick*, 11 Or. 337 (3 Pac. 469); *Case v. Noyes*, 16 Or. 329 (19 Pac. 104). Mr. Waples says that the proceeding against a garnishee "is a judicial cause between parties. It is begun by a summons, or its equivalent, and results in a judgment with all the other characteristics essential to a lawsuit." Waples on Attachments, par. 470. The proceeding, it is true, is ancillary and subsidiary to the main action, and is undoubtedly dependent for its utility upon the final results attained in that action; but the garnishment in effect subrogates the plaintiff to the rights of the defendant in the main action, and empowers him to sue the defendant's garnished debtor. He takes the shoes and asserts the rights of the defendant against the garnishee. "He sues for property or credits in his own name, but upon the cause of action acquired by such legal subrogation." The garnishee is a party only to the action against himself, in which the plaintiff urges the right of the principal defendant against him, and is not a party to the main action. See Waples on Attachments, pars. 473-475, 477. STRAHAN, J., in *Case v. Noyes*, 16 Or. 329 (19 Pac. 104), says: "The allegations provided by the code are designed to en-

able the plaintiff to bring upon the record the cause of action which the original defendant had against the garnishee, and to which the plaintiff has become subrogated by virtue of the attachment." So that we have here all the characteristics of a distinct action, though subsidiary to the main case, and for the purposes of trial and appeal it has been so treated in practice, in so far as it pertains to the courts of general jurisdiction. For all essential purposes the proceeding must be regarded as an action, and such it has been decided to be, in effect, by this court (*Smith v. Conrad*, 23 Or. 206, 31 Pac. 398), the parties to it being the plaintiff in the main action, suing in the right of the defendant and the garnishee; and that it is a civil action no one will dispute.

The jurisdiction of the justice's court extends to the allowance of the provisional remedy by attachment in like cases as in a court of record: Hill's Ann. Laws, § 2057. For the mode and manner of making up the issues, conducting the trial, and procuring judgment, we are referred by the Justice's Code (*Id.* § 2064) to the Code of Civil Procedure, which establishes and comprehends all the provisional remedies known to the statute, and provides the manner of their enforcement. So that the mode of procedure in the garnishment proceedings is the same, whether prosecuted in the justice's court or in a court of general jurisdiction; and, if a proceeding can be regarded as an action in the latter jurisdiction, it must be so regarded in the former. In this view the garnishee, against whom the plaintiff prevails in such proceedings, is "a party to a judgment in a civil ac-

tion in a justice's court," within the meaning of the provision allowing appeals from such judgments. This appears to be a reasonable interpretation of those sections of the Justice's Code pertaining to the commencement of actions in justices' courts, the allowance of the provisional remedies, and the remedy by appeal, and in consonance with the intent of the legislature in adopting the code. The statute is certainly broad enough to comprehend the action promoted by the garnishment, as well as the action in the main case. The judgment of the court below will be affirmed.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

SMYTH v. NEAL.

(49 Pac. 350.)

1. **WATERS—LOSS OF APPROPRIATION.**—A landowner who makes an actual diversion of a certain quantity of water, and gives notice of an intended appropriation of a specific amount, is entitled to a reasonable time within which to make an actual application of all his intended appropriation to the contemplated useful purpose, but where he fails to use reasonable diligence, under the circumstances, for the accomplishment of such purpose he loses his initiative or inchoate appropriation, or so much thereof as he fails to utilize: *Nevada Ditch Company v. Bennett*, 30 Or. 59, applied.
2. **INSUFFICIENCY OF ESTOPPEL.**—Plaintiff, by making favorable representations to defendant of the desirability of his neighborhood for settlement, and by discussing methods for irrigation, and stating that he thought the supply of water from the creek was sufficient for them both, and making no objection to his use of water therefrom, is not estopped to claim a superior right to so much of the water as prior to and during all such time he had been using for beneficial purposes to the knowledge of defendant.

From Harney: **MORTON D. CLIFFORD**, Judge.

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Suit by Darius H. Smyth against John H. Neal to enjoin the diversion and use of certain waters. Defendant had a decree, whereupon plaintiff appealed.

REVERSED.

For appellant there was a brief over the names of *Charles A. Sweek*, and *Cox, Cotton, Teal & Minor*, with oral arguments by *Messrs. Sweek and Lewis B. Cox*.

For respondent there was a brief and an oral argument by *Mr. Thornton Williams*.

Opinion by MR. JUSTICE WOLVERTON.

This suit was commenced in May, 1895, to restrain the defendant from diverting water from Smyth Creek, in Harney County, Oregon. The plaintiff claims a prior appropriation of all the water of the creek, and seeks to have his claim established by decree, and the defendant permanently enjoined from interfering in any manner with his use thereof. The defendant concedes that plaintiff is entitled to some use thereof, but claims by his answer an appropriation of one hundred and fifty inches prior in time and superior in right to that of plaintiff. The questions presented by the briefs and at the argument are: (1) What is the amount of plaintiff's appropriation? And (2) is he estopped to question any appropriation that defendant may have acquired?

In May, 1873, the plaintiff settled upon a pre-emption claim consisting of the southwest quarter of the northwest quarter of section one, the southeast quar-

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ter of the northeast quarter and the east half of the southeast quarter of section two, township twenty-nine south, range thirty-three east, situate in Harney County, Oregon, and subsequently acquired title thereto from the general government. In August, 1882, he settled upon a homestead consisting of the east half of the northeast quarter, and the northeast quarter of the southeast quarter of section eleven, and the northwest quarter of the southwest quarter of section twelve, in the same township, and received a patent therefor in August, 1888. Smyth Creek is a perennial stream, flowing in its natural channel in a northerly direction through the northwest quarter of the southwest quarter of section twelve, and the southwest quarter of the northwest quarter of section one. In 1876 the plaintiff constructed a dam in the creek, a short distance north of said northeast quarter of the southwest quarter of section twelve, upon the premises of G. C. Smyth, his father, and diverted a portion of the water by means of a small ditch, carrying it upon the north end of the east half of the northeast quarter of section eleven, thence upon and through his pre-emption claim. In 1883 or 1884 the head of this ditch was changed to a point a little higher up on the stream, but the amount of the diversion was not increased. It is impossible to determine from the evidence the quantity of water diverted by means of this ditch, but it is probable that not more than half the stream was ever so diverted. The plaintiff utilized water from Smyth Creek for irrigating wild grasses, which grow in sufficient abundance to be cut and cured for hay, ever since the construction of said dam and ditch,—some through the

ditch and laterals thereto, and some by damming the main stream and turning it into old channels, and damming these again and conducting it upon the meadows then covered by his pre-emption, and by the homestead subsequently acquired, by means of plow furrows and shallow lateral ditches, so constructed that the mower could be run over them without great inconvenience.

There is some conflict in the testimony touching the extent of these meadow lands. The plaintiff says they contain from one hundred and thirty to one hundred and forty acres; the defendant, one hundred and ten; while other witnesses estimate the area thereof at not more than eighty or ninety acres. From the whole, it is quite probable that one hundred and twenty acres is a fair estimate. Besides these meadow lands, plaintiff early began the cultivation and irrigation of grain and garden lands which theretofore were arid and covered with sagebrush, and reduced to cultivation and continuously irrigated for a number of years last past, according to his statement, about eighteen acres,—fifteen of grain and three of garden. Other witnesses vary in their estimates, some being higher and some others lower than the plaintiff's, but his statement we believe to be substantially correct. From plaintiff's case in chief, it is impossible to gather any definite idea touching the quantity of water needed or required for the irrigation of these lands. The defendant has, however, cured this defect, and from his testimony we are able to arrive at a fairly satisfactory conclusion. The witness Whiteside testifies to having had experience in the use of water

for the irrigation of wild meadow lands, and says, in effect, that one-half inch to the acre, if handled economically, would be sufficient for the purpose. This evidence is uncontradicted and unimpeached, and, from the intelligence of the witness, must be taken as a fair estimate. For the eighteen acres of grain and garden one inch to the acre is ample. The parties practically agree that wild grass irrigation ends about the middle of June. The defendant so testifies, and the plaintiff fixes that time in a proposition contained in the record for a decree to be entered in his favor, but grain and garden lands require irrigation for a much longer period. It seems to have been a conceded proposition that the use of water for the irrigation of these wild meadow lands was for a useful purpose, and that such irrigation was necessary for the production of grass in sufficient quantities to be gathered and cured as feed for stock. The plaintiff has other lands capable of cultivation and irrigation from Smyth Creek, but during all the time since his settlement upon his pre-emption and homestead claims he has not utilized any water for the irrigation thereof; nor do we understand that he has ever made any attempt at such additional use, unless the construction of his new dam still higher up on the stream in 1895, and the partial construction of a ditch from that point, may be construed into such a purpose. But by his testimony he expressly disclaims any purpose of the kind, or that he intended thereby to increase his previous appropriations.

1. We understand that where a party has made an actual diversion of a specific quantity of water, and

perhaps where he has given notice of an intended appropriation of a specific amount, he is entitled to a reasonable time within which to make an actual application of the whole of his intended appropriation to the contemplated useful purpose, using reasonable diligence, under the circumstances, for the accomplishment of such purpose, but that where he fails in such diligence he loses his initiative or inchoate appropriation, or so much thereof as he fails to put to a useful or needful purpose: *Nevada Ditch Company v. Bennett*, 30 Or. 59 (45 Pac. 472), and cases there cited. Plaintiff produced a notice at the trial, which appears to have been filed in the county clerk's office in 1882, whereby he claimed an appropriation of two hundred inches of the water of this stream for agricultural purposes, but has made no additional or other use of the water than he had made prior to that date, and can now claim nothing by reason of such notice. Under the conditions here ascertained and determined, and the law applicable thereto, we conclude that plaintiff has acquired a completed prior appropriation of seventy-five inches of water from Smyth Creek for and during the spring months, and until June 15, and eighteen inches thereafter.

2. But it is contended that he is estopped to assert this right by his acts and demeanor towards the defendant while he was reducing his lands to cultivation, and using water from the same stream for the purpose of their irrigation. The defendant's lands are located above those of plaintiff, as it respects Smyth Creek. He settled upon a pre-emption in 1885, and acquired title shortly after, and then settled upon

a homestead which adjoined the plaintiff's lands, and in due course acquired title to that. Subsequently he acquired title to a timber-culture claim and other lands. He began the use of water in 1886, and continued such use for irrigation until 1895, when he had in cultivation and utilized, for the production of timothy, alfalfa, grain, and vegetables, approximately one hundred acres. He also utilized water for the production of wild grass on other land, the acreage of which is not definitely fixed. Suffice it to say that the defendant has made some appropriation of the water of Smyth Creek, the quantity whereof we will not now undertake to determine, as it is not insisted upon by him, unless it be found that his right to the use of such water is superior to that of the plaintiff. Several years before the defendant settled upon Smyth Creek, the plaintiff attracted his attention to the locality by a favorable representation of the surroundings, grass, water supply, etc; and in September, 1895, at the time he settled there, the plaintiff accompanied him upon the lands, showed him the lines and section corners, and discussed to some extent the water supply, and was present or had direct knowledge touching the purchase by defendant of a prior pre-emption right, or of its relinquishment from the lands upon which the defendant then located his pre-emption and upon which he began the diversion and use of water. Plaintiff also at the time discussed somewhat with the defendant the better method to be adopted, by which irrigation would be advantageously employed. Thereafter plaintiff had full and complete knowledge of the valuable and extensive improvements the defendant was

making upon his lands,—that he was inclosing and breaking portions of them up, reducing them to cultivation, seeding them to alfalfa and timothy, and planting to grain and garden, and was constantly employing the waters of Smyth Creek for their irrigation, as well as for the irrigation of wild grasses for hay, through a system of ditches designed especially for advantageous and economic use. During all this time, and up to the spring of 1895, the plaintiff made no objections to the defendant's use or employment of the water, and upon one or two occasions told the defendant that he thought the supply by means of the creek was ample for both. In 1895, however, the supply in large part failed, so that there was not sufficient water for the needs of both parties. This was an unusual condition, and precipitated this suit.

Is there enough in all this, however, to constitute an estoppel in defendant's favor? It must be remembered that the plaintiff was also, during the same period of time, in the full enjoyment of his completed prior appropriation, of which the defendant was all the while fully cognizant. In *Boggs v. Mining Co.*, 14 Cal. 368, it was said, "There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title; the effect of the estoppel being to forfeit his property and transfer its enjoyment to another." These elements must concur, to constitute the estoppel for which defendant contends, viz.: He must have been destitute of knowledge of his own legal rights, and of the means of acquiring such knowledge; the plaintiff must have made some admission or done some act

with the intention of influencing the conduct of the defendant, or which he had reason to believe or the necessary tendency of which would be to so influence him, inconsistent with the assertion of title in himself; that the defendant has acted upon or been influenced by such demeanor; and that he will now be prejudiced by allowing the effect of such acts or admissions to be controverted: *Luz v. Haggin*, 69 Cal. 255, 266 (10 Pac. 674); *Anaheim Water Co. v. Semi-Tropic Water Co.*, 64 Cal. 185, 194, 195, (30 Pac. 623.) The admissions, if they may be so termed, and conduct of the plaintiff, by which defendant claims to have been influenced to settle upon Smyth Creek, and his admissions, conduct, and demeanor during all the time between 1885 and 1895, were not calculated to delude or mislead the defendant, who had not only full cognizance of his own rights, but also had knowledge that plaintiff had been, anterior to his settlement, and was during all said time, employing a portion of the water of the stream for beneficial purposes. Plaintiff's demeanor was not inconsistent with truth and fair dealing, and there is no estoppel in the premises upon which defendant may depend. When the shortage in water occurred, in 1895, it is probable that defendant interfered somewhat with plaintiff's prior appropriation; but it is not altogether clear that plaintiff is without fault in the matter, and for this reason the costs of the suit ought to be divided. The decree will therefore be that plaintiff's prior appropriation be established in accordance with this opinion, that he recover his costs in this court upon the appeal, and

that the defendant recover his costs in the court below.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

CROSSEN v. MURPHY.

(49 Pac. 858.)

31	114
134	57

31	114
138	221
86	456

RESCISSION OF CONTRACT FOR FRAUD—TENDER.—It is a rule of almost universal application that where a defrauded party elects to rescind a sale or other contract he must annul it as a whole, and must return the consideration received, so that the parties may be again, as far as possible, on an even footing: *Frink v. Thomas*, 20 Or. at page 271, approved.

EQUITY—RESCISSION—TENDER OF CONSIDERATION.—In a suit in equity to rescind a contract voidable for fraud it is not necessary for the plaintiff to return, or offer to return, before suit the consideration received, but it is enough if he deposits it in court.

LAW ACTION BASED ON RESCISSION—TENDER.—In a law action, based on a rescission of a contract consummated through fraud, the complaint must allege that the consideration has been restored, or that plaintiff is willing to restore.

INFERENCE OF AFFIRMANCE—DELAY.—The commencement of a suit to rescind a contract of sale, voidable for fraud, three weeks after the vendor discovered the fraud, is not such an unreasonable delay as to warrant the inference of an affirmance of the agreement on his part.

RESCISSION OF FRAUDULENT SALE.—Plaintiff was in the retail business with a partner, in whose name the lease of the building was made out. The partner, by collusion with members of a mercantile company, sold them his interest and transferred to them the lease. They thereupon gave plaintiff four days' notice to vacate the premises, and offered to buy his interest in the business, giving in part payment certain notes, representing them as first class paper, and also offered to employ him as clerk until the balance of the purchase price should be paid. Plaintiff accepted, and the contract was executed, but he was almost immediately discharged, and the notes proved to be worthless. *Held*, that the circumstances justified a rescission of contract for fraud.

EQUITY JURISDICTION.—A court of equity which has jurisdiction of a cause at its inception does not lose it because prior to the decree the situation is so changed by the acts of the defendants as to render it possible for a court of law to grant the same relief. Equity in such a case will adjudge the entire matter and do justice to all parties.

From Baker: ROBERT EAKIN, Judge.

This is a suit by Edward E. Crossen against William Murphy, J. W. Stuchell, G. Henderson, and the Harrisburg Mercantile Company to rescind a contract for the sale and delivery of a quantity of merchandise. The facts are that on December 24, 1895, plaintiff and defendant Murphy entered into an agreement by the terms of which they became equal partners in conducting a clothing and furnishing store at Baker City, Oregon; but, the business not proving profitable, they, on April 28, 1896, entered into separate contracts with the defendant, the Harrisburg Mercantile Company, a corporation, for the sale and delivery of their respective interests in the merchandise then on hand, the memorandum executed by the plaintiff stipulating that he was to transfer an undivided one-half of the stock at 90 per cent. of the cost thereof, and in consideration therefor the purchaser agreed to deliver to him the promissory note of L. R. Green, O. Green, and F. E. Green for \$200, of J. R. Cartwright for \$677, and of W. W. Briggs for \$77, to pay one-half of the firm debts, and the remainder of the purchase price in cash within sixty days, and also to employ plaintiff as long as there should be work for him to do, or until the balance due him was paid. An invoice of plaintiff's interest in the stock of goods having been made, on the basis agreed upon, the value thereof, including his interest in the store fixtures, was ascertained to be \$1,930.57; insurance policy, \$12.47; miscellaneous items, \$6.80; cash paid by the firm of Murphy & Crossen, \$15; and services rendered

by the plaintiff as clerk, \$44.24; making a total credit of \$2,009.08. The promissory notes mentioned in the agreement having been indorsed "without recourse," and delivered to the plaintiff, he was charged on the book of the corporation with the amount of the notes, including interest, \$964; one-half of the firm debts, \$933.28; and cash and goods from the store, \$92.55; making the total amount so charged, \$1,989.83, and leaving a balance due the plaintiff of \$19.25, which was paid to him on June 2, 1896, and he was thereupon discharged, the corporation taking the following receipt as evidence of settlement: "Baker City, June 2, 1896. Received from H. & S. Trading Co., in full for all accounts, nineteen and twenty-five one hundredth dollars. \$19.25. Edward E. Crossen." Plaintiff, without the knowledge or consent of the Harrisburg Mercantile Company, erased from each of said notes the words "without recourse," and on September and October 1, 1896, upon the maturity of the Cartwright and Green notes, respectively, he caused them to be protested for nonpayment.

It is alleged in the complaint that Murphy and the defendants Stuchell and Henderson, as president and secretary, respectively, and acting as agents of the Harrisburg Mercantile Company, entered into a conspiracy to compel plaintiff to dispose of his interest in the merchandise at a sacrifice, and to defraud the creditors of the firm of Murphy & Crossen, in pursuance of which Murphy, without plaintiff's knowledge or consent, transferred his interest in the stock of goods, and, the lease of the building occupied by them having been taken in his name, transferred that

also, to the Harrisburg Mercantile Company, on obtaining which the agents thereof notified plaintiff to vacate the said building within four days; and, being unable to procure another building, he was compelled to sell and did sell and transfer his interest in the stock of goods at a loss; that Murphy, being acquainted with Stuchell and Henderson, assured plaintiff that any statements made by them could be relied upon, and that they falsely represented to plaintiff that each of said notes was first-class bankable paper, and the makers thereof solvent and able to pay the same; and, being ignorant of their financial condition, and relying upon these representations, he was induced to and did accept an assignment of these notes as security for the payment of the amount so due on the purchase of the merchandise; that such representations were false; that the said notes are wholly worthless and of no value whatever, and that the makers are, and each of them is, insolvent, which facts were well known by the said defendants; that the Harrisburg Mercantile Company, notwithstanding its agreement to that effect, had failed, neglected, and refused to pay any of the firm debts, and plaintiff was being pressed by the creditors for a settlement of the same. Issue having been joined, the cause was referred, and, upon the evidence being reported, the court found therefrom that said representations were false, that the plaintiff relied thereon, and that he accepted said notes as payment in ignorance of the fact that they had been indorsed "without recourse." And the court, having further found that they were to be indorsed in such manner as to render the mercan-

tile company liable in case the makers thereof made default in their payment, rendered a decree awarding plaintiff \$964, the amount of said notes, from which the defendants appeal.

AFFIRMED.

For appellant there was a brief over the names of *Martin Luther Olmstead* and *J. D. Slater*, with an oral argument by *Mr. Olmstead*.

For respondent there was a brief and an oral argument by *Mr. Thomas H. Crawford*.

MR. CHIEF JUSTICE MOORE, after making the foregoing statement, delivered the opinion of the court.

It is contended by counsel for defendants that they should be placed in *statu quo*, as a condition precedent to the right to maintain a suit to rescind the contract, and that the complaint is fatally defective because it fails to allege a return or tender of the notes in question. A party to a contract, defrauded by the other party thereto, may avoid the terms of, and rescind, the agreement; but, if he elects to do so, he must annul it as a whole, for he cannot be permitted to treat it as valid in part and bad in some particulars: *Perley v. Balch*, 23 Pick. 283 (34 Am. Dec. 56); *Hoffman v. King*, 70 Wis. 372 (36 N. W. 25); *Higham v. Harris*, 108 Ind. 246 (8 N. E. 255); *Coolidge v. Brigham*, 1 Metc. (Mass.) 547; *Bohall v. Diller*, 41 Cal. 532; *Purdy v. Bullard*, 41 Cal. 444. "It is a general rule," says BEAN, J., in *Frink v. Thomas*, 20 Or. 265 (12 L. R. A. 239, 25 Pac. 717), "that in order to disaffirm a contract, and entitle a party to the rights resulting therefrom, the rescind-

ing party must put the other in *statu quo*. He must account to the other for any money paid in part performance of the contract." The rule is universal that to entitle a party of lawful age, who is mentally responsible, to rescind a contract which he has been induced to enter into by the false or fraudulent representations or evil devices of the other party to the agreement, he must, if possible, place the defrauding party in *statu quo*, by restoring everything of value he may have received as a consideration for the contract, and that a negotiable promissory note executed by a stranger, though insolvent, furnishes no exception; nor can the party seeking the rescission excuse his neglect in failing to return it by showing that it was worthless, by reason of the maker's insolvency, for such an instrument may possess some value to the party who put it into circulation: *Spencer v. St. Clair*, 57 N. H. 9; *Evans v. Gale*, 21 N. H. 240; *Whitcomb v. Denio*, 52 Vt. 382. It has been held, however, that if the defrauded party has accepted the vendee's own notes in consideration of the execution of a voidable contract, he is under no legal obligation to return them as a condition precedent to the right of rescinding the agreement, but may maintain trover for the goods and chattels, the possession of which he has surrendered, without any previous demand therefor, and also defer the delivery of the notes until the trial, when they may be given up to be canceled upon the rendition of the judgment: *Thurston v. Blanchard*, 33 Am. Dec. 700; *Ryan v. Brant*, 42 Ill. 78; *Nichols v. Michael*, 23 N. Y. 264 (80 Am. Dec. 259). The reason usually assigned for the existence of this rule is that

the moment the injured party elects to rescind the contract the promissory notes in his possession, which have been given by the defrauding party, *ipso facto* become entirely worthless, and, having been rendered valueless by a failure of the title to the property upon the faith of which they were executed, there is no necessity for returning them; but this principle can have no application to the notes of a third person which may have been accepted as the consideration of the contract, for they are not tainted with the fraud, nor affected by the election of the defrauded party to avoid the agreement, but might be enforced against the maker, or the defrauding party may consider them of some value notwithstanding the rescission.

In *Sisson v. Hill*, 18 R. I. 212 (21 L. R. A. 206, 26 Atl. 196), MATTESON, C. J., in discussing the right of a vendor to withhold the consideration of a contract until an action at law to rescind it had been determined in his favor, says: "It has been held that in cases in which the vendor has received from the fraudulent vendee money as a part of the consideration, and in which he sues in trover for the recovery of pecuniary damages for the conversion of the goods obtained by the fraud, he may retain the money, and allow it to go in reduction of the damages to be recovered: *Warner v. Vallily*, 13 R. I. 483; *Ladd v. Moore*, 3 Sandf. 589. So, too, it has been held in numerous cases in which the plaintiffs have sued in trover that when the fraudulent vendee has given his note, or even the note or other obligation of a third person, as the consideration, in whole or in part, for the goods obtained, it is not necessary for the vendor to return,

or offer to return, such note or obligation before suit, but that it is enough if he bring it into court to be impounded at the trial for the benefit or protection of the vendee: *Duval v. Mowry*, 6 R. I. 479; *Thurston v. Blanchard*, 22 Pick. 18 (33 Am. Dec. 700); *Frost v. Lowry*, 15 Ohio, 200; *Nellis v. Bradley*, 1 Sandf. 560; *Ladd v. Moore*, 3 Sandf. 589; *Coghill v. Boring*, 15 Cal. 213." Mr. Chief Justice AMES, in *Duval v. Mowry*, 6 R. I. 479, commenting upon the same principle, says: "Such a condition to a remedy in such a case is wholly unknown in courts of equity, where cases of rescission or cancellation of contracts on the ground of fraud usually come; the court deeming it quite sufficient to provide that justice be done to the injurious as well as to the injured party by its own action: Adams on Equity, 71, and cases cited. No good reason can be given why, when courts of law deal with the rescission of contracts on the ground of fraud, they should not do so, so far as the nature of their remedies will permit, upon the same footing with courts of equity." The principle promulgated in *Sisson v. Hill*, 18 R. I. 212 (21 L. R. A. 206, 26 Atl. 196), may well be questioned when applied to an action at law in which the plaintiff deems the contract rescinded; and no doubt the correct rule is announced in a note to the case of *Bryant v. Isburgh*, 74 Am. Dec. 661, in which the compiler says: "In legal actions, brought as though the contract had been rescinded, a complaint which does not allege restoration, or an offer to restore, does not state a cause of action: *Van Liew v. Johnson*, 6 Thomp. & Co. 648; *Anthony v. Day*, 52 How. Prac. 35. * * * In a suit in equity for a

decree of rescission, the complaint need not allege a tender or offer to perform: *Bloomer v. Waldron*, 3 Hill, 366; *Hoyt v. Jaques*, 129 Mass. 286.”* The maxim that “he who seeks equity must do equity” is evidently not violated by the failure of the plaintiff in a suit to rescind a contract for fraud to allege a restoration of, or an offer to return, the consideration, or a willingness even to do so; for by his application to the court for equitable redress he concedes that before it will be awarded he must do equity, which will compel him to account for everything of value he may have received, thereby tacitly inviting the court to protect the rights of the defendant by decreeing a restoration in consideration of the rescission. This method would permit a vendor who had been defrauded, but who was unable to restore the consideration, to institute a suit to rescind a contract voidable for fraud; for the court could do equity by all parties by decreeing that the amount so received should be a lien upon the property in favor of the vendee. In the case at bar the plaintiff, having deposited in court the notes in question, did all that was required of him in an equitable proceeding.

It is contended that plaintiff, by erasing the words “without recourse” from the notes, and causing them to be protested for nonpayment, conclusively shows that he elected to affirm the contract after his discovery of the alleged fraud. It will, no doubt, be admitted that the commencement of the suit manifests an intention to rescind the contract; and, as the notes

*NOTE.—With the case of *Sisson v. Hull*, 21 L. R. A. 206, is a large collection of authorities on the necessity of returning consideration before bringing replevin for property obtained by fraud.—REPORTER.

were not protested until after the complaint was filed, it is evident that the plaintiff elected to avoid the terms of the agreement prior to the protest of the notes. The evidence fails to show when the plaintiff discovered the alleged fraud, or when he erased the qualifying words of the indorsement from the notes. If this erasure were made after the suit was instituted, it could not affect the election to rescind, while, if it were done before discovering the alleged fraud, no inference could be deduced therefrom that plaintiff intended to affirm the agreement. The fraud relied upon as a basis for the relief demanded consists in part in the alleged false representations concerning the solvency of the makers of these notes. The erasure made by the plaintiff did not increase the ability of the makers to meet the payment of their respective obligations, and, this being so, we fail to see how the alteration of the indorsements evidences an intention to affirm an agreement. The plaintiff was discharged from the defendants' employ on June 2, 1896, about which time he claims to have discovered that their representations were false; and, having commenced this suit on the twenty-third of that month, it cannot be said that there was such an unreasonable delay as to warrant an inference of an affirmance of the agreement.

It would be impossible to reconcile the testimony given upon the merits of the principal question, and hence no effort will be made in that direction. Crossen testifies that Murphy, without his knowledge or consent, sold and transferred his interest in the stock of merchandise, and assigned to the Harrisburg Mer-

cantile Company the lease of the building occupied by them, and that Stuchell thereupon notified him to vacate the premises. Murphy, Stuchell, and Henderson contradict this witness as to his statement of want of knowledge of the sale of Murphy's interest, but neither of them denies that he was notified to surrender the building. The term of the lease to Murphy expired prior to the sale of his interest in the merchandise, but he had an option to renew it, which he exercised, and again took the lease in his own name, whereupon he assigned the same and transferred his interest in the goods. This method was, no doubt, designed and operated to compel plaintiff to dispose of his interest in the merchandise; but, having been offered employment by the Harrisburg Mercantile Company upon acquiring such interest, he seems to have had confidence in its agents, notwithstanding their notice to him to vacate the premises. While plaintiff might possibly have been obliged to vacate the building theretofore occupied by the firm of Murphy & Crossen, he nevertheless had the right to retain the assets for the purpose of winding up the affairs of the co-partnership: *Marx v. Goodnough*, 23 Or. 545 (32 Pac. 511); *Miller v. Brigham*, 50 Cal. 615. "Whenever undue advantage," says SHERWOOD, J., in *Bell v. Campbell*, 123 Mo. 1 (45 Am. St. Rep. 505, 25 S. W. 362), "is taken of a party, 'under circumstances which mislead, confuse, or disturb the just result of his judgment, and thus expose him to be the victim of the artful, the importunate, and the cunning; where proper time is not allowed to the party and he acts improvidently; if he is importunately pressed; if those in whom he places confi-

dence make use of strong persuasions; if he is not fully aware of the consequences, but is suddenly drawn in to act; if he is not permitted to consult disinterested friends or counsel before he is called upon to act in circumstances of sudden emergency or unexpected right or acquisition,—in these and many like cases, if there has been great inequality in the bargain, courts of equity will assist the party upon the ground of fraud, imposition, or unconscionable advantage.' " It is, no doubt, true that plaintiff was offered a valuable consideration for his stock of merchandise; and, if he had received the price agreed to be paid therefor, there could not have been any inequality in the bargain, and a court of equity would not relieve him upon the ground of unconscionable advantage, notwithstanding the method adopted to obtain the title.

The plaintiff testifies that Murphy was acquainted with Stuchell and Henderson, and that he assured him that any statements made by them could be relied upon, and that the latter represented to him that the makers of the notes in question were solvent, that these instruments were valuable, and that they could be cashed at any bank where the makers were known, and, relying upon these representations, and being ignorant of the financial condition of the makers, and not having time to make any inquiry concerning the same, he was induced to and did accept an assignment of the notes under an agreement that the Harrisburg Mercantile Company would become liable thereon as an indorser thereof. All this is denied by Stuchell and Henderson, but they admit saying to him that they had dealt a great deal with

Cartwright; that he owned considerable property, was engaged in raising hops, and they considered him responsible for his obligations; that they did not know the Greens, but relied upon Cartwright's indorsement of their note; that Briggs had no property, but that he had always paid his debts, and they believed he would discharge this obligation. Crossen further testifies that the notes were assigned to him in the evening, after the invoice of the goods was completed, and that he did not notice that they had been indorsed without recourse. Stuchell, Murphy, and Henderson each testify that the indorsements were made in the presence of Crossen, and that Stuchell thereupon, in his hearing, read aloud the memorandum on the notes. Crossen denies this, and he is indirectly corroborated by the testimony of J. W. Rowland, a disinterested witness, who assisted in making the invoice, and was also a witness to the contract entered into between plaintiff and the Harrisburg Mercantile Company, who says that he did not see the indorsement made nor hear it read, and, if it had been read, he would have heard it. The only evidence of the insolvency of the makers of the notes in question is the testimony of the plaintiff to that effect, and the inference thereof deducible from the protest of these instruments for nonpayment. One thing is evident, however, that plaintiff parted with his title to his interest in the merchandise expecting to receive the value thereof, but in this he has been disappointed. Nor do we think plaintiff is estopped by the receipt given by him in settlement, for at the time it was executed it does not appear that he was aware of the

defendants' conduct of which he complains. It appears that Murphy obtained in cash only sixty per cent. of the invoice price for his interest, while Crossen was to receive ninety per cent. for his share, and this fact is relied upon as tending to show that a price would never have been offered Crossen for his interest unless the notes would have been received in payment thereof. This is probably true; but, even if that be so, the fact remains that plaintiffs' action in accepting the offer was no doubt precipitated by the notice to vacate the premises within four days, and by the offer of the defendants to furnish him employment in the store, and that the action thus brought about resulted in the consummation of an agreement by which plaintiff parted with the possession of his goods for an inadequate consideration.

As hereinbefore stated, a party cannot, as a rule, be permitted to rescind a contract in part, and treat the rest of it as valid. In this case, however, the plaintiff sought relief by a suit to rescind the entire contract, in which a receiver was appointed, who took possession of the merchandise in question; but the defendants, having executed an undertaking to satisfy any decree that might be rendered against them, obtained the discharge of that officer and the restoration of the goods, which they proceeded to sell, and thereupon paid the debts of Murphy & Crossen in accordance with their agreement so to do. Most of the goods having been disposed of, a decree rescinding the contract of sale became impracticable, in view of which the court below very properly adjusted the controversy by decreeing that the Harrisburg Mercantile Company

pay to plaintiff the sum evidenced by said notes then on deposit in court, leaving the executed part of the contract undisturbed. It is evident that a court of equity, having jurisdiction of a cause at its inception, does not lose it because prior to the decree the situation is so changed by the acts of the defendants as to render it possible for a court of law to grant the same relief. The conclusion we reach on the facts is not free from doubt, but we believe the plaintiff has shown such a course of conduct on the part of the defendants as to entitle him to an affirmance of the decree, and it is so ordered.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

EATON v. McNEILL.

(49 Pac. 375.)

RAILROADS—FENCES—INJURY TO STOCK.—If stock enter upon a railway at a point where the statute requires the road to be fenced, and are injured by a moving train, the company will be liable in damages, regardless of whether it was negligent; but if stock enter on the right of way at a place where the company is not bound to fence, and are injured, negligence must be shown to justify a recovery: *Moses v. Southern Pacific Railroad Company*, 18 Or. 385, approved.

From Union: **STEPHEN A. LOWELL, JUDGE.**

This is an action by A. E. Eaton against Edwin McNeill, as receiver of the Oregon Railway and Navigation Company, to recover damages for the loss of certain stock claimed to have been killed and injured by moving trains of the defendant, and for other injuries to property. The complaint contains seven counts, but, as the assignments of error relate to the

second cause of action alone, no further reference need be made to the others. After alleging the incorporation of the railroad company, the appointment of the defendant as receiver, the ownership by plaintiff of certain horses and mares, the complaint, for a second cause of action, avers that the animals in question, without the fault of the plaintiff, strayed upon the track of the railroad operated by the defendant at a point about one-fourth of a mile northwest of the Union depot in Union County, and were killed and injured through the negligence and carelessness of defendant's agents and servants in the operation and management of his locomotives and cars, to plaintiff's damage in the sum of \$210 in aggregate, and that the track and grounds of the railroad at the point where the animals were killed and injured were not fenced as required by law. A demurrer to this cause of action on the ground that it did not state facts sufficient to constitute a cause of action being overruled, the defendant answered, denying the allegations thereof, and alleging affirmatively that the animals in question entered upon the track and grounds of the railroad at the depot or station grounds of Union station. A reply being filed, a trial was had, resulting in a verdict in favor of plaintiff for the sum of \$85 upon this cause of action, and defendant appeals.

REVERSED.

For appellant there was a brief over the names of *Cox, Cotton, Teal & Minor, Joel M. Long* and *Thos. W. Crawford*, with an oral argument by *Messrs. Long and Crawford*.

For respondent there was a brief and an oral argument by *Messrs. J. M. Carroll and T. H. Marsh.*

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

The record contains numerous assignments of error, but the only question we deem it necessary to consider is as to whether the evidence is sufficient to support the verdict. This question arises out of defendant's motion for nonsuit, as well as his motion for a verdict by direction of the court. The facts, as disclosed by the testimony, are that the track of the railroad operated by defendant runs east and west at Union station, and that there is a fence and cattle guard along the west line of the depot grounds. West of this line the track passes through the farm of Shaw, and is fenced on both sides as required by law. On the morning of the second of May, 1895, some horses belonging to the plaintiff were found within the inclosed right of way a short distance west of the cattle guard, with their legs broken and otherwise badly injured; but there was no evidence whatever upon the part of the plaintiff as to how they got there, unless it is to be inferred from the testimony of the witness Shaw, who says that the fence inclosing the track was down near where the injured animals were found. But the failure to keep the fence in repair is not charged as a ground of negligence in the complaint; nor is there any evidence tending to show that the stock entered at that point, or that the condition of the fence was due to the negligence of the defendant, or was the proximate cause of the injury. On the con-

trary, the evidence for the plaintiff is to the effect that, about three o'clock of the day before the injury, the animals in question were driven by the witness Shaw from near his place to a point about one mile east of the depot, on the public highway leading from the town of Union to the station, and, in returning from that point to the place where they were found injured, they would necessarily be compelled to pass the station; that blood and hair were found on the cattle guard west of the depot, and along the track to the place where the injured animals were found, thus clearly indicating that, on their return from the place where Shaw left them, they had probably become frightened at an approaching train, and ran down the track from the depot grounds across the cattle guard, and into a bridge, and in so doing had been injured. There can be no other reasonable inference drawn from the plaintiff's testimony. It is conclusively shown to have been the fact by the uncontradicted and unimpeached testimony of the trainmen called by the defendant, who testified that at two o'clock in the morning, as the train approached Union station from the east, they discovered a band of horses on the track a short distance from the station building, and between it and the switch west thereof; that the animals became frightened at the approach of the train, and ran west along the track, scrambling through the cattle guard, and passed out of sight; that they stopped the train, and, upon again moving forward, proceeded cautiously, keeping a sharp lookout; that a short distance west of the cattle guard they found four of the animals in a bridge, and that they again stopped the

train and helped them out. This is all the evidence given by either party showing how the animals came to be injured, and upon these facts the question of liability depends.

No right of recovery is claimed on account of the negligence of the agents or servants of defendant in the operation and management of trains, but it is predicated wholly on the absence of a fence as required by statute; and we are clearly of the opinion that no recovery can be had on that account, because it appears that the animals went upon the track at a point where the defendant was not required to fence. The rule is unquestioned that if the stock enter upon a railway at a point where the statute requires the road to be fenced, and are injured or killed by a moving train, the railroad company will be liable in damages, whether it occurred through the negligence of the company or not; but, if they enter at a place where the law does not require the company to fence, a different rule prevails, and before a recovery can be had the plaintiff must prove that the killing was caused by the negligence of the defendant: *Moses v. Southern Pacific Railroad Company*, 18 Or. 385 (23 Pac. 498); *Railroad Company v. Bull*, 72 Ill. 537; *Louisville, etc., Railway Company v. Goodbar*, 102 Ind. 596 (2 N. E. 337,* and 3 N. E. 162); *Bremmer v. Green Bay, etc., Railroad Company*, 61 Wis. 114 (20 N. W. 687); *Peters v. Stewart*, 72 Wis. 133 (39 N. W. 380); *Baldwin v. St. Louis, etc., Railway Company*, 63 Iowa, 210 (18 N. W. 884); 3

*NOTE.—With the report of this case in 2 N. E. 337, is a note collecting and classifying a large number of authorities on the liability of railroads for injuries to animals, where the road is not fenced.—REPORTER.

Wood's Railway Law, par. 419. In *Louisville, etc., Railway Company v. Goodbar*, 102 Ind. 596 (2 N. E. 337, and 3 N. E. 162), Mr. Justice ELLIOTT says that "it is the place of entry that controls." As said in *Railway Company v. Tretts*, 96 Ind. 450: "The place of entry is the material question. This is the ruling in many cases. [Citing a number of cases.] These cases declare that if the place where the animals entered was one which the railroad company was bound to fence, and the place was not fenced, the company is liable, although the place where the animals were killed was securely fenced; but, if the animals entered at a point where the railroad company was not bound to fence, the company is not liable, although the animals were killed at a place where there was no fence." The evidence of the case at bar brings it clearly within this rule. Under the statutes and decisions of this state, a railway company is not required to fence its depot grounds or railway tracks therein: *Moses v. Southern Pacific Railroad Company*, 18 Or. 385 (23 Pac. 498). And the evidence is clear that the animals went upon the track from the depot grounds, and, this being so, their injuries were in no way attributable to the absence of a fence required by the statute.

It was contended to some extent on the trial that the railroad company had included in its depot grounds more land than it lawfully had a right to do; but this question is wholly immaterial in this case, because the undisputed evidence shows that the animals went upon the track at a point between the station building and the west switch, and there is no suggestion that such point is not within the depot

grounds, whether their proper limit is a question of law or fact. It follows that the judgment of the court below must be reversed, and the cause remanded with directions to enter nonsuit in favor of the defendant as to the second cause of action set up in the complaint, and to render judgment accordingly.

REVERSED.

[Decided August 2, 1897.]

EISEN v. MULTNOMAH COUNTY.

(49 P.2C. 730.)

1. **LIABILITY OF COUNTIES FOR COSTS.**—A county is not liable to a person who has been tried and acquitted on a criminal charge for the costs and disbursements incurred in the defense, and that for two reasons: (1) There was no liability at common law, since costs were unknown; and (2) there is no statute conferring the right to recover such items, section 565 of Hill's Annotated Laws not being applicable to criminal actions. This section refers to cases where a public corporation sues or is sued for the enforcement of property rights.
2. **IDEM.**—Section 2361, Hill's Ann. Laws, which provides that costs in criminal actions shall be paid by the proper county to the person rendering the services, and be taxed against defendant in case of conviction, does not give defendant on acquittal a claim against the county, on which judgment can be rendered in his favor, but such costs as were incurred in enabling him to make his defense are to be paid by the county to the person rendering the service.

From Multnomah: ALFRED F. SEARS, Judge.

On September 13, 1896, Wm. T. Eisen was tried for the crime of manslaughter and acquitted, in the Circuit Court of Multnomah County, and subsequently filed a statement of certain costs and disbursements which he claims to have incurred in the trial of such action, and moved the court for judgment against the county therefor. This motion was denied, whereupon his claim was presented to the county court for allow-

ance, and, payment being refused, this action was brought to recover the amount thereof. A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action was sustained by the court below, and the plaintiff appeals.

AFFIRMED.

For appellant there was a brief over the names of *Ralph W. Wilbur* and *Wilson T. Hume*, with an oral argument by *Mr. Wilbur* and *Mr. John H. Hall*.

For respondent there was a brief over the names of *Cicero M. Idleman*, Attorney-General, and *Charles F. Lord*, District Attorney, with an oral argument by *Mr. Thad. S. Potter*, Deputy District Attorney.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. The only question for decision is whether a judgment can be awarded against the county for costs and disbursement in favor of a defendant who has been tried and acquitted on a criminal charge. At common law costs, as such, were unknown, and it is therefore settled doctrine that a court has no power to award them in favor of a defendant in a criminal action unless the statute has expressly conferred it: 4 Am. and Eng. Enc. Law (1st ed.), 323; 1 Bishop on Criminal Procedure, § 1315; *Phillips v. Gaines*, 131 U. S. Append. clxix. This rule is not questioned by the plaintiff, but he claims that section 565 of the Code of Civil Procedure (Hill's Ann. Laws), which provides that "in all actions or suits prosecuted or defended in the

name and for the use of the state, or any county or other public corporation therein, the state or public corporation shall be liable for and may recover costs in like manner and with like effect as in the case of natural persons," makes the county liable for costs in a criminal action upon the acquittal of a defendant. But this section is a part of the Civil Code, and evidently refers to costs in actions or suits brought by or against the state or a county to enforce some civil or corporate right, and not to a criminal prosecution instituted by the state in its sovereign capacity to punish a violation of some public law. As said by Mr. Chief Justice RYAN in *Noyes v. State*, 46 Wis. 252 (1 N. W. 2), "There is a broad distinction between the status of a state instituting a prosecution in its sovereign capacity to assert its sovereign rights, to enforce its public laws, or to protect its citizens, and the status of a state suing to enforce mere rights of property, as a private person might do in like case." It is to the latter class of cases the statute has reference.

2. The only provision of law upon the subject of costs in criminal actions is section 2361, Hill's Ann. Laws,* which provides that they shall be paid to the person rendering the service by the proper county, and taxed against the defendant in case of a conviction. By this and other provisions of the statute the several counties of the state are by law required to pay the necessary expenses of every criminal trial,

*Section 2361. "The costs and disbursements in a criminal action or proceeding are paid to the person rendering the service, by the proper county; but in case of a judgment of conviction such costs and disbursements must be taxed against the defendant."—REPORTER.

but such payments are to be made to the person rendering the service, and not to the defendant. He has, or can have, no claim against the county upon which a judgment can be rendered in his favor, but such necessary costs and disbursements as may be incurred in his behalf and for the purpose of enabling him to make his defense are to be paid by the county to the person rendering the service, the same as other charges against the county. The judgment of the court below is therefore affirmed.

AFFIRMED.

[Decided May 1, 1897.]

FALCONIO v. LARSEN.

(48 Pac. 708; 37 L. R. A. 255.)

1. **INSOLVENCY—ASSIGNABILITY OF A PREFERRED CLAIM FOR LABORER'S WAGES.**—The preferential claim for wages of laborers given by the act of February 20, 1891, (Laws, 1891, p. 82) is, after presentation, assignable, and, when assigned, the assignee may maintain suit thereon in his own name: *The Victorian Number Two*, 26 Or. 194, applied.*
2. **ASSIGNMENT OF CHOSE IN ACTION.**—The fact that a claim for wages is assigned for collection only does not destroy its validity or affect the right of the holder to sue in his own name: *Roberts v. Parrish*, 17 Or. 563, followed.
3. **ATTORNEYS—COMPROMISE PENDING SUIT.**—Settlement out of court after an action is brought, if made without the knowledge or consent of the attorney for the plaintiff, is to be viewed with suspicion, especially if the defendant knew of a contract giving the attorney supervisory control over the distribution of the collection.

From Multnomah: E. D. SHATTUCK, Judge.

***LABORER.**—For a discussion of what classes of persons are included in the terms "laborers" and "employees," see a note to *Johanson v. Barrills*, 27 Or. 251 (50 Am. St. Rep. 717.) Subsequent cases on the subject are but few: In *Lewis v. Fisher*, (Md.) 26 L. R. A. 278, it was decided that the expression "wages or salaries to clerks, servants, or employees," does not include the compensation of an attorney for legal services. In New York it has been lately held (*Palmer v. Van Santvoord*, 158 N. Y. 612, 38 L. R. A. 402) that a person employed at a salary by a manufacturing company to travel among its customers, to fix and set up, pack, unpack, and ship

81	137
36	626
31	137
46	146
31	137
48	30

The purpose of this action is to establish ninety-eight different and distinct claims, ranging in amount from \$1.25 to \$100, preferred by certain laborers and employees against the estate of E. S. Larsen, an insolvent debtor, for labor and services rendered the said Larsen within ninety days prior to the date of his assignment for the benefit of his creditors, and is prosecuted under the provisions of an act entitled "An Act to Protect Employees and Laborers in Their Claims for Wages," approved February 20, 1891 (Laws, 1891, p. 82). Larsen was a contractor for the construction of a ditch for irrigating purposes in Wasco County, and the claimants were laborers, and in that capacity performed work, labor, and services thereon at his special instance and request. Each of them made a statement of his claim under oath, in all respects as required by the statutes, and presented the same to the assignee within thirty days after the assignment. Some twenty days later, Larsen filed exceptions thereto, and thereafter they were all assigned by the claimants to Donny Falconio, who brings this action, setting forth in his complaint as many different causes of action as there were original claimants. It is alleged

its products, and incidentally to solicit sales, is an employee, within the meaning of a statute giving a preference to claims for wages of employees.

A general manager and superintendent of a mine, who does not perform bodily toil, does not "labor" within the meaning of a statute giving a lien to one "who performs labor," etc.: *Boyle v. Mountain Key Mining Company*, (N. M.) 50 Pac. 847. The Supreme Court of Georgia decided that, generally speaking, a clerk in a store is not a "laborer," though each case must be determined with reference to its own particular facts and circumstances (*Oliver v. Macon Hardware Company*, 58 Am. St. Rep. 300, 98 Ga. 249, 25 S. E. 403); and a later case from the same state holds that a civil engineer is not a "laborer," whose wages are exempt from garnishment. The court says: "By reference to his testimony it will readily appear that, while he may have performed some work with his hands, some work attended with physical and muscular exertion, yet his services in the main were not such as depended for their proper performance upon mere physical power to do ordinary manual labor, but consisted principally of work requiring mental

that each of said claims was assigned for collection, and that the amount collected is to be paid to the respective claimants. There was a judgment for plaintiff, from which defendant appealed.

AFFIRMED.

For appellant there was an oral argument by *Mr. Walter S. Perry*, with a brief over the names of *Milton W. Smith* and *Wallace W. Thayer*, (*Mr. Perry*, of counsel), urging these points:

The act of 1891 is to be construed strictly; no one comes within its terms unless the statute puts him there, expressly or by necessary implication: *Johnston v. Barrills*, 27 Or., at page 259 (50 Am. St. Rep. 717, 41 Pac. 656).

The lien is strictly personal to the class of persons indicated, and, in the absence of a statute to that effect, cannot be assigned, either as to the right to claim and perfect it, or as to the right to enforce it: *Caldwell v. Lawrence*, 10 Wis. 331; *Brown v. Smith*, 55 Iowa, 31; *Dano v. M. A. & R. Company*, 27 Ark., at p. 566; *Cairo, etc., Railway Company v. Fackney*, 78 Ill., at p. 119; *Pierson v. Tincker*, 36 Me. 384; *Roberts v. Fowler*, 4 Abb.

skill or business capacity, and involving the exercise of his intellectual faculties:" *McPherson v. Stroup*, 28 B. E. 157. So, too, writing editorials for a newspaper, preparing copy for the printers, directing the make-up of the paper, reading proof, reporting and gathering news, is not "labor" such as will support a preferred claim against an insolvent estate, since such services are intellectual rather than manual; but the work of a mailing clerk is "labor" such as the statute contemplates: *Michigan Trust Company v. Grand Rapids Democrat*, (Mich.) 71 N. W. 1102. Those of the foregoing cases that are reported in the Law. Rep. Ann. and Am. St. Rep. have extensive notes that practically exhaust the law of the subject.

The president of a manufacturing company is not an "office agent, a mechanic or laborer," so as to give him a preference for unpaid salary: *Seventh National Bank v. Shenandoah Iron Company*, 35 Fed. 436; nor are the claims for salary by the manager, or secretary, or treasurer of an insolvent corporation "labor claims," so as to entitle them to a priority of payment over general creditors: *Fidelity Insurance Company v. Roanoke Iron Company*, 81 Fed. 440.—REPORTER.

Pr. 263; *Fitzgerald v. First Presbyterian Church*, 1 Mich. (N. P.) 243; *Horton v. Sparkman*, 2 Wash., at p. 168; *Lehigh Coal, etc., Company v. Central Railway Company*, 29 N. J. Eq., at p. 255.

If the benefits of the privilege are assignable, they cannot be assigned until the right to the preference has been ascertained and fixed definitely and with certainty, and so ascertained and fixed by the personal acts of the laborer himself: *Brown v. Harper*, 4 Or. 89; *Mills v. La Verne Land Company*, 97 Cal. 254 (33 Am. St. Rep. 168); *McCrea v. Johnson*, 104 Cal. 224; *Casey v. Ault*, 4 Wash. 167; *Goodman v. Pence*, 21 Neb. 459; *Noll v. Keneally*, 37 Neb. 879; *Tewksberry v. Bronson*, 48 Wis. 581.

The privilege given by the act of 1891 is not consummated, where it is contested, until it is established by judgment: Laws, 1891, pp. 82-3, §§ 1-2.

Where there is a statute upon the subject, the attorney has such lien only as the statute gives him, and it can be enforced only in the manner provided for by that statute: *Alderman v. Nelson*, 111 Ind. 255.

Plaintiff's counsel could get no lien until judgment and notice, because prior to that time the debt of defendant to plaintiff was not "money in the hands of the adverse party" within the meaning of 1 Hill's Ann. Laws, Or. p. 689, § 1044, par. 3: *In re Scoggin*, 5 Saw. 549.

Where there is no statute to the contrary effect, and no competent notice to defendant of the fact that plaintiff's counsel claim a lien, the parties may settle the controversy between themselves: *Mosely v. Jamison*, 71 Miss. 456; *Sheedy v. McMurtry*, 44 Neb. 499;

Wright v. Wright, 70 N. Y. 96; *Mercer v. Graves*, L. R. 7 Q. B. 499.

Such a settlement is not "to be viewed with suspicion," as charged by the trial court; and the burden of proof upon the point of fraud in the transaction and notice is upon the person attacking the settlement: *Simmons v. Almy*, 103 Mass. 33; *Clark v. Smith*, 6 Mann. & G. 105; *Parker v. Blighton*, 32 Mich. 266; *Hutchinson v. Pettes*, 18 Vt. 614.

The plaintiff is not the real party in interest, within the meaning of 1 Hill's Ann. Laws, p. 148, § 27, and the action should be dismissed: *Hoagland v. Van Etten*, 22 Neb. 681; *Grimes v. Cannell*, 23 Neb. 187; *Abrams v. Cureton*, 74 N. C. 523; *Botswick v. Bryant*, 113 Ind. 448; *Rock County National Bank v. Hollister*, 21 Minn. 385; *Iselin v. Rowlands*, 30 Hun. 488.

For respondents there was a brief over the name of *McMahon & McGinn*, with an oral argument by *Mr. Michael J. McMahon*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

The principal question suggested by the controversy is touching the assignability of claims of laborers, the preferment of which the enactment is designed to promote. No contention is made but that the claimants might each for himself have prosecuted an action in his own name of the nature here adopted to establish his individual claim; but it is insisted that the preference which the law raises is a privilege strictly personal to the claimant, and one

which he alone can exercise; that the mode or process by means of which he may avail himself of the privilege is specifically pointed out by statute, and, being a procedure unknown to the common law, it should be strictly followed in the establishment of the preferential right, and, until fully perfected, it is not in any event assignable. The statute, in so far as it concerns the case at bar, is, in effect, that hereafter, whenever any assignment for the benefit of creditors shall be made, the debts owing to laborers or employees, which have accrued by reason of their labor or employment, to an amount not exceeding \$100 to each employee for work and labor performed within ninety days next preceding the assignment, shall be considered and treated as preferred debts, and such laborers and employees shall be preferred creditors, and shall first be paid in full; but, if there be not sufficient to pay them in full, then the same shall be paid to them *pro rata* after paying costs. Any such laborer or employee desiring to enforce his claim for wages under sections 1, 2, and 3 of this act, shall present a statement under oath, showing the amount due after allowing all just credits and set-offs, the kind of work for which said wages are due, and when performed, to the assignee, within thirty days after the property shall have been placed in the hands of such assignee. (The form of the statement is given, and runs in the first person.) Thereupon he shall serve upon the debtor, or upon his assignee where personal service cannot be had, a copy of such claim, and thereafter it shall be the duty of the assignee to report the amount of such claim or claims to the court having

jurisdiction, together with a statement of all costs occasioned by the assignment; and such court shall order said claims to be paid after payment of costs and expenses of the assignment, out of the proceeds of sales of the property assigned; provided, that any person interested may contest such claim or claims, or any part thereof, by filing in said court exceptions thereto, supported by affidavit; and thereupon the claimant shall be required to establish his or her claim by judgment in such court before any part thereof shall be paid. When any claim is excepted to, the person desiring to establish the same shall file in said court his verified complaint as in an action at law, and serve the same upon the person excepting and the principal debtor, and thereafter the cause shall proceed to final judgment between said parties as an action at law. Section 2 provides for the adjustment of costs and attorney's fees, and section 3 that the assignee shall not be discharged until every claimant presenting his or her claim under the provisions of the act shall have been paid in full, or *pro rata*, or shall have consented to the discharge.

1. The act creates a new right, and prescribes a remedy for its enforcement. In so far as it imposes a burden upon specific property, it should be strictly construed; but, where the right is clearly given, the interpretation should be such as will promote, rather than impede or destroy, the remedy, so as to meet, if reasonably within the terms of the statute, the exigencies which impelled the enactment. In other words, a remedy is the concomitant of a right; and, where a new right is established, its usefulness depends upon

the means of its enforcement, so that, when the legislature attempts to prescribe a remedy, it will be presumed that it intended to adopt such a one as will effectuate the purpose, and the interpretation of the remedial enactment will be such as to promote the intentment as fully as the language employed will admit. The undoubted purpose of the act was to constitute the laborer or employee a preferred creditor, as it pertains to the property of his employer seized upon by any process, or passing to a receiver or assignee. Under all the conditions enumerated, the property is placed in *custodia legis*, and thereafter it is administered in pursuance of law; and the act in question imposes an additional burden upon it, and subjects it first, after the payment of certain costs, to the payment of the labor claims designated. The enactment does not create a lien, but invests the laborer or employee with the rights and privileges incident to the relation of preferred creditor, and directs the order of his payment out of a fund which is already in the custody of the law for the purpose of administration, in subordination to its rules and regulations. The act declares that hereafter, when the property of any person shall be seized, etc., such laborers or employees "shall be preferred creditors, and shall first be paid." Laws, 1891, p. 81, § 1. Thus, the legislature has inseparably coupled the preference with the event which inures instantaneously, upon the happening thereof, to the benefit of the designated classes. It is a substantive right, created by edict, and not the right to acquire it by the doing of certain things or the observance of any conditions. The property is charged, *ipso facto* the hap-

pening of the seizure or the assignment, with the prior payment of the debts of laborers or employees which have accrued under the conditions contemplated.

With the right or preference thus clearly established, it remains to examine the manner of its enforcement, and to determine to what extent the remedy must be pursued as a personal privilege. Manifestly, the statute comprehends only such debts as are owing to the laborers or employees at the date of the seizure or assignment, and these debts are denominated "claims for wages." Now, it is provided that any such person desiring to enforce such a claim shall, in case of an assignment, present a statement, made out and verified in the form and manner prescribed, to the assignee, within thirty days after the property has been placed in his hands, and serve a copy upon the debtor. Such is the method by which a claimant may avail himself of his preference. Thus far it would seem that the privilege is personal to the laborer or employee, as he may adopt the remedy if he desires, within the statutory period, or he may waive it as a debtor may waive the exemptions from seizure upon execution, by not claiming them in due season from the officer having the property in charge. When a claim is thus presented, a duty is devolved upon the assignee to report it to the court, and upon the court to direct its payment out of the proceeds of the sale of the property, first after the payment of the costs and expenses of the assignment. But it is further provided that any person interested may contest such a claim by filing exceptions thereto, and thereafter it is made incumbent upon the claimant to establish the

same by filing a verified complaint, as in an action at law, and that thereafter the cause shall proceed to judgment between the parties. We take it that the matter which is here made the subject of litigation and contest is the debt, and it is the province of the court to determine the nature, and what, if any, of such debt has accrued and remains unpaid; but whether or not the claim has been properly made out or verified or presented, and whether within the prescribed time, are purely questions of law, that have necessarily to be passed upon, whether there is a contest or not. So that the purpose of the contest is not to establish the preference but the claim. The preference is established when the privilege is exercised by a due presentment of the verified statement. Now, it will be conceded that the claim, aside from the preference, which may be denominated a "personal privilege," is assignable, and, under the code practice, may be sued upon by the holder in his own name; but, when the privilege is exercised, the preference becomes an incident of the debt, which is thereby constituted a preferred claim, and, when the debt is assigned, the incident accompanies it. So, we see no reason why the assignee of the debt may not file a complaint in his own name to establish the claim, as he might do upon the simple demand, and, if established, the preference abides with it still, as an incident.

The question whether statutory liens are assignable, or, if so, whether the action should be prosecuted in the name of the assignor, has but little to do with the present case. It is merely a question here whether a preferred claim of the class created

by the enactment is assignable, so as to entitle the assignee to prosecute the action in his own name to establish the debt, its nature and amount, if contested; and we are of the opinion that it is. The right of exercising the privilege in claiming the preference we hold to be personal, but, when exercised by the presentation of the statement, the preference becomes an incident of the debt or claim for wages, and may be assigned;* and henceforth the action may be prosecuted in the name of the legal owner and holder of the claim if contested. This interpretation is manifestly in consonance with the spirit of the act. It was designed to protect a deserving class of individuals, who are usually dependant upon their recent earnings for the sustenance of themselves and those dependant upon them, and it was undoubtedly the purpose of the legislature to make the wages of labor speedily available, and the assignment of their preferred claims would more frequently promote the purpose than otherwise. We cite the following authorities as tending to support the view we here entertain: *The Victorian Number Two*, 26 Or. 194 (46 Am. St. Rep. 616, 41 Pac. 1103); *Duncan v. Hawn*, 104 Cal. 10 (37 Pac. 626); *Murphy v. Adams*, 71 Me. 113 (36 Am. Rep. 299); *Skyrme v. Occidental Mining Company*, 8 Nev. 220; *Chicago & N. E. R. Company v. Sturgis*, 44 Mich. 538 (7 N. W. 213); *Day v. Vinson*, 78 Wis. 198 (10 L. R. A. 205, 47 N. W. 269); *Kinney v. Duluth Ore*

*NOTE.—This subject is carefully reviewed in a monographic note to *Kinney v. Duluth Ore Company*, 49 Am. St. Rep. 580. See also notes to *The Victorian Number Two*, 46 Am. St. Rep. 616, and *Mills v. La Verne Land Company*, 38 Am. St. Rep. 171. These notes show the distinction between assigning a right to a lien for labor and materials and assigning the right to enforce such a lien after it has been perfected by filing a notice, and classify the authorities under each head.—REPORTER.

Company, 58 Minn. 455 (49 Am. St. Rep. 528, 6 N. W. 23); *Kerr v. Moore*, 54 Miss. 286; Phillips on Mechanics' Liens, § 55.

2. That the claims were assigned for collection does not destroy their validity nor deter the holder from suing in his own name: *Roberts v. Parrish*, 17 Or. 583 (22 Pac. 136); *Young v. Hudson*, 99 Mo. 102 (12 S. W. 632); *Allen v. Brown*, 44 N. Y. 228; *White v. Stanley*, 29 Ohio St. 423; *Boyd v. Corbitt*, 37 Mich. 52.

3. As a defense to the action, the defendant pleads a settlement with the plaintiff touching the claims in question, and full payment and satisfaction in accord therewith. The plaintiff, replying, denied the settlement, but alleged that, if any such was had, it was obtained by fraud and without consideration. After the defendant had given evidence touching the settlement, the plaintiff, for the purpose of showing that, when defendant was attempting to negotiate the settlement, he had full notice and knowledge of the capacity in which plaintiff was acting touching such claims, offered in evidence an agreement between M. J. McMahon, the attorney engaged to prosecute the claims, and himself, whereby it was agreed that no assignment, sale, or transfer of any interest in said claims should be made by plaintiff, and that the proceeds, when collected, should be distributed or paid to the assignors under the supervision and control of the attorney, and also another paper, purporting to be a notice of attorney's lien filed in the cause, which were received over the objections of the defendant. Thereafter the court instructed the jury touching the alleged settlement and allegation of fraud in relation thereto as follows:

"When parties have gone to law about a matter, they may settle between themselves without the intervention of an attorney on either side, or with an attorney on one side, if they see fit to do so, but after an action is commenced, and the parties appear with an attorney in court, any settlement of the claim out of court without the knowledge or consent of the attorney is to be viewed with suspicion. If there is any fraud in the case, such a settlement may be set aside." This the defendant excepted to, and these constitute the two remaining questions to be disposed of.

The agreement and the notice of lien were properly admitted in evidence. The issue was whether the settlement was fraudulent, having been, among other attendant circumstances, negotiated in the absence of the attorney who was, under the agreement, directly charged with the supervision of the distribution of the proceeds after collection. The agreement tended to show the plaintiff's position and authority in the premises, and it and the notice of lien were pertinent to disclose the relations and interest of the attorney in the transaction. And it appearing that the defendant had knowledge of the existence of these instruments, and even of their contents, prior to the alleged settlement, they were significant in this connection as tending to show an apparent disregard of the rights of interested parties. Nor was the instruction objectionable. In *Bussian v. Milwaukee R. R. Co.*, 56 Wis. 335 (14 N. W. 453), TAYLOR, J., says: "We think that no release obtained from the plaintiff after an action has been commenced and counsel employed, in the absence of the plaintiff's counsel, and without his con-

sent or knowledge, should bind the party unless the utmost good faith is shown on the part of the defendant in obtaining the same. When a party has employed an attorney to prosecute an action, such attorney ought to be consulted if a compromise of such action be sought, and ordinarily it would be an act of bad faith on the part of the client and the opposite party to compromise the action without the consent of or without consulting such attorney." The language of the instruction is no stronger than this. It is evident the defendant knew of the attorney's employment, and of the supervisory control over the distribution of the proceeds of the collection accorded him under his agreement with the plaintiff; and it seems to us that the language of the learned judge, that "any settlement of the claim out of court without the knowledge or consent of the attorney is to be viewed with suspicion," was especially adapted to the controversy. See also *Watkins v. Brant*, 46 Wis. 419 (1 N. W. 82).

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

OGDEN RAILWAY COMPANY v. WRIGHT.

(49 Pac. 975.)

NOTES.—LIABILITY OF TRUSTEE.—One who signs a promissory note "as trustee of" another is *prima facie* personally liable.*

From Union: STEPHEN A. LOWELL, Judge.

Action by the Ogden City Street Railway Company of Ogden, Utah, against W. T. Wright and F. L. Rich-

*NOTE.—The following cases have annotations considering the personal liability of corporate officers on notes made for the corporation: *Kline v. Bank of Teacott*, 84 Am. St. Rep. 110; *Matthews v. Dubuque Mattress Company*, 19 L. R. A. 676.—REPORTER.

mond, as individuals, to recover on two promissory notes, one of which is as follows:

"\$757.42. PORTLAND, Or., May 30th, 1894.

On or before 30th Nov., 1895, after date, without grace, for value received, I promise to pay Ogden City Street Railway Company seven hundred and fifty-seven and ninety-two one-hundredth dollars and interest thereon from date at a rate of eight per cent. per annum from date until paid, all in U. S. gold coin; and I further agree to pay all taxes and assessments which may be levied or assessed to the holder of this note on account thereof, and in case suit or action is instituted to collect this note, or any portion thereof, to pay such further sum as the court may adjudge reasonable as attorney's fees in said suit or action.

F. L. RICHMOND,

As trustee of F. Nodine.

W. T. WRIGHT,

As trustee of F. Nodine."

The other note is identical in every particular with the foregoing, except that it evidences a promise to pay the sum of \$380.36, and is payable to the Utah Loan & Trust Company. A demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, having been sustained, judgment was rendered dismissing the action, from which the plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. J. D. Slater*.

For respondents there was a brief over the names of *Chamberlain & Thomas*, *Frank A. E. Starr*, and *Thos. H. Crawford*, with an oral argument by *Mr. George E. Chamberlain*.

PER CURIUM. The only question on this appeal is whether, upon the face of the notes, the defendants are personally liable. In the execution thereof they have designated themselves as trustees of F. Nodine, and, as a trustee is one who holds the legal title to property under an agreement, express or implied, to apply it and the income arising therefrom to the use and benefit of another (1 *Parsons on Contracts*, 122; *Anderson's Law Dictionary*, title "Trustee"), it must be assumed, in the absence of the circumstances indicating a different relation, that they are simply the holders of the legal title to certain property in trust for Nodine. And upon this theory the sufficiency of the complaint must be determined. Now, the law is well settled, as stated by Mr. Parsons, that such a trustee "is bound personally by the contracts he makes as trustee, although designating himself as such; and nothing will discharge him but an express provision showing clearly that both parties agreed to act upon the responsibility of the funds alone, or some other responsibility exclusive of that of the trustee, or some other circumstance clearly indicating another party who is bound by the contract, and upon whose credit alone it is made. The mere use by the promisor of the name of trustee, or any other name of office or employment, will not discharge him. Some one must be bound by the contract, and if he does not bind

some other he binds himself, and the official name is then regarded only as describing and designating him:" 1 Parsons on Contracts, 121. See, also, *Taylor v. Davis' Administratrix*, 110 U. S. 330 (4 Sup. Ct. 147.)

Many authorities are cited by the defendants to the effect that where it appears from the face of the instrument that the party signing it acted in a representative capacity, and intended to bind his principal, and not himself, the courts will, in furtherance of justice, adopt such a construction as will effectuate the actual intention of the parties. But there is nothing in the record here to show that the defendants, in executing the notes, were acting as the agents or representatives of any one. They say they are trustees of a private individual, and a trustee is not an agent, and has no principal. As clearly pointed out by Mr. Justice Woods in *Taylor v. Davis' Administratrix*, 110 U. S. 330 (4 Sup. Ct. 147), "An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise. The contract is, therefore, the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The

mere use by the promisor of the name of trustee, or any other name of office or employment, will not discharge him." It is therefore manifest that the complaint states a cause of action against the defendants personally, and, if the facts and circumstances surrounding the execution of the notes are such as to change their apparent liability, it must be made so to appear by answer. The court below was in error in sustaining the demurrer to the complaint, and the judgment must be reversed, and the cause remanded, with directions to overrule the demurrer, and for such further proceedings as may be right and proper, not inconsistent with this opinion.

REVERSED.

[Decided at PENDLETON July 31, 1897, rehearing denied.]

TURNER v. COLE.

(49 Pac. 971.)

31	154
37	534
81	154
42	262
42	263
43	268

1. **WATER RIGHT AN APPURTENANCE.**—The right to water for irrigation, when appurtenant to land, passes by a grant of the land, though not specially mentioned: *Simmons v. Winters*, 21 Or. 35, and *Hindman v. Rizer*, 21 Or. 112, applied.
2. **NONUSER—ABANDONMENT.**—The mere nonuser for a single season of an appurtenant water right does not constitute an abandonment. One of the essentials of that result is an intention to relinquish, which is not shown in this case: *Wimer v. Simmons*, 27 Or. 1, approved.

From Malheur: ROBERT EAKIN, Judge.

Suit by A. W. Turner and another against J. L. Cole and others to determine the rights of the respective parties to certain running waters. There was a decree for Turner, from which all parties appeal.

MODIFIED.

For plaintiffs there was a brief and an oral argument by *Messrs. J. L. Rand and John J. Balleray.*

For defendants there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Lewis B. Cox.*

Opinion by MR. JUSTICE WOLVERTON.

The purpose of this suit is to determine the priority of conflicting water rights as between Turner, one of the plaintiffs, and the defendants Cole and Kendall, and C. J. Gray. The plaintiff claims to have acquired his right by appropriation and use of the waters of Willow Creek, diverted therefrom by means of two ditches, which tap the creek, one upon each side, in the southeast quarter of section ten, township sixteen south, range forty-three east, in Malheur County. Willow Creek runs in a southeasterly course, and these ditches are so constructed that they encompass upon the north, east, and west the principal portion of plaintiff's lands. Within their compass are found, also, some road lands used by plaintiff, and adjoining his. The ditch through which Gray claims his appropriation taps said creek about one and a half miles above those of plaintiff, and the Cole and Kendall ditch some eight miles above. The questions to be considered are almost exclusively of fact, and, there being much conflict in the testimony, no good purpose can be served by attempting to harmonize it, and hence we will briefly state our conclusions without comment thereon.

Turner is now the owner of the southeast quarter

of section ten, the northwest quarter and the northeast quarter of the southwest quarter of section fourteen, township sixteen south, range forty-three east. His title thereto comes through mesne conveyances, the southeast quarter of section ten from Jonathan Keeney, the northwest quarter of the northwest quarter of section fourteen from John A. Garvin, and the remainder from Edward W. Imbler, all of whom acquired from the government. Early in 1871, Fred Cable and Edward Price were settlers upon the tracts subsequently acquired by Keeney and Imbler, and the plaintiff was a settler upon a tract of one hundred and twenty acres lying to the south and adjoining the Imbler tract. In March of that year Cable, Price, and Turner commenced the construction of the plaintiff's ditches, and upon their completion, probably in June following, diverted the water from Willow Creek. By agreement each was to have a joint interest in the ditches and in the appropriation to be made thereby. The purpose for which the diversion was made is evidenced by a notice, signed by Price, bearing date April 3, 1871, and recorded in the county clerk's office at Baker City, May 6, 1871, whereby he claimed one thousand two hundred inches of water, to run in a ditch then being constructed by him, for irrigating purposes. It is not claimed, however, that more than five hundred inches of water were diverted or appropriated, and the plaintiff claims to have secured an appropriation of two-thirds thereof. It is clear that there was a diversion of water through these ditches prior to any appropriation by either of the defendants. The evidence does not establish any con-

tractual relations between Cable and Keeney, either directly or indirectly, touching his settler's rights in the southeast quarter of section ten, and it is not apparent that Keeney ever acquired such rights from Cable. The testimony furnishes but a bare intimation that such was the case. Mr. Imbler was asked: "Do you know how much hay was cut on the place owned by Cable, and afterwards sold by him to Keeney?" to which he replied: "No, sir; after Keeney got it, he cut quite a lot of hay." This is all the reference that is made to such a sale, and the answer does not establish anything regarding it. So that, in so far as the Cable appropriation is concerned, and that which is claimed to be appurtenant to the tract then occupied by him, there is a complete failure of proof by which to establish title in the plaintiff reaching back to the inception of the alleged right, and this disposes of one-half of the appropriation which he is now seeking to establish.

1. As between Price and Imbler it is very satisfactorily shown that Imbler purchased the former settler's rights, and acquired from him a transfer of possession, which would carry with it whatever water appropriation was appurtenant thereto: *Hindman v. Rizer*, 21 Or. 112 (27 Pac. 13). The several deeds through which the plaintiff connects his title with that of Imbler make no special mention of the appropriation of any water right acquired through these ditches; but, if appurtenant to the land, it would pass with the grant in general terms: *Simmons v. Winters*, 21 Or. 35 (28 Am. St. Rep. 727, 27 Pac. 7). The Price or Imbler tract consists of one hundred and sixty

acres, and, from what we can gather from the testimony as it comes to us, very nearly all of it lies under these ditches, and is susceptible of irrigation therefrom. In its wild state the land produced native grasses, principally what is known in that section of the country as "blue joint," "red top," and "rye grass." These grow upon low lands, where the water overflows in the late spring and early summer, in such abundance that they are cut for hay and fed to stock in the winter season. During the time that Imbler occupied the land, from 1872 to 1876, he sowed six or eight acres of timothy, since which time other tame grasses have been sown, until at the present time it produces principally timothy, red top, and alfalfa, and these are matured and cut for hay. The ditches have been utilized as a means of constructing a fence, for drainage, and for irrigation; but there is much conflict in the testimony touching the real purpose for which they were originally constructed. We think it has been shown, however, that drainage was necessary to good husbandry in the first instance, so as to control the water supply, but after that was accomplished the use of the water was as necessary to the production of the hay crop as before, and was supplied by means of the ditches. Mr. Reeves, a very intelligent witness, says, touching the land at the time Price lived on it: "There was a portion of the Price land, and a good deal other of Willow Creek meadow land, that needed more draining than irrigation, but after you drained it, and turned this water off, by turning it on again it would produce more hay." Now, ever since the construction

of these ditches the water has been utilized through them, for the irrigation of these meadow lands, with possibly an exception of a year now and then. The grasses have also been improved by supplanting them in a great measure with tame varieties, so that the production of hay from these premises has grown into a valuable industry. The water has also been put to other uses upon this land by means of said ditches. It has been used for irrigating gardens, for producing small quantities of grain, and for stock and domestic purposes; and we think there has been an appropriation of water through and by means of these ditches for a beneficial use that is appurtenant to the lands settled by Price, and afterwards patented to Imbler, and that such appropriation relates to the time of their construction. The extent of the appropriation must be determined by the quantity of water used, and the time of its use, as it is the policy of the law that none shall be permitted to go to waste when it can be appropriated for a beneficial purpose elsewhere. The season during which these meadow lands are irrigated begins in April or May, and terminates the latter part of June or the first day of July; and from a consensus of the testimony we find that they do not require the full supply needful for the production of crops upon the higher and drier lands in the vicinity, yet a substantial amount is necessary to a successful use thereof. During the remaining summer and fall months, however, there is less use for water for irrigation and domestic purposes. In view of these considerations, we think the plaintiff is entitled to an appropriation of one hundred inches of water from Willow Creek

from the first of April to the middle of July, and fifty inches thereafter, prior in time and superior in right to any appropriation of the defendants.

2. It is contended that there was an abandonment by plaintiff's predecessors of this appropriation, and stress is laid upon the testimony of Glenn, who says, "I did not buy any water right, nor sell any, and knew nothing about any such right," and on Lockett, who says, "I did not buy any water right, did not claim any, and did not sell any." Glenn was the administrator of the estate of Jonathan Keeney from September, 1878, until some time in the winter of 1879, but aside from this, never owned or possessed any interest in the lands, nor did he claim any, except that he says he traded Mr. Imbler a claim on the Owyhee River for his place on Willow Creek, and had Imbler make his deed direct to Keeney. He testifies that, while he was such administrator, he superintended the management of the place, and that he made no use of the water during that time. The title of the land passed by deed from the Keeney heirs to Lockett, and not by administrator's deed. Glenn was without power or authority to relinquish or abandon the appropriation appurtenant thereto by a simple disclaimer of title, and his nonuser of the water for the short time he was in possession did not operate as an abandonment. Lockett bought the land in November, 1879, and sold it in January or February, 1880. He never had occasion to crop it, or to irrigate it, and what he now says pertains to his understanding of what he acquired and held by his deed, and what he transferred to his successor. There was no attempt made by him to relin-

quish any appropriation appurtenant to the land, nor does it appear that he ever had any such intention while in the ownership, without which "there can be no abandonment": *Wimer v. Simmons*, 27 Or. 1 (50 Am. St. Rep. 682, 39 Pac. 6). Nor can such intent be inferred from the acts of Lockett while he owned the land. The acts of Glenn and Lockett do not constitute an abandonment, and the testimony, aside from theirs, tending to show nonuser from time to time is insufficient to establish it. We have very carefully examined the testimony touching the prior appropriation claimed by the defendants, and we believe the findings of the court below are in accord therewith. The decree will be modified as indicated by this opinion.

MODIFIED.

[Decided at PENDLETON July 31, 1897.]

HOWARD v. RECKLING.

(49 Pac. 361.)

PUBLIC LANDS—MORTGAGE OF HOMESTEAD CLAIM.—The homestead act (Rev. St. U. S. § 2296), providing that no lands acquired thereunder "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," merely prevents the unwilling appropriation of the land to the satisfaction of such debts, and does not prevent the homestead claimant, after issuance of the final certificate, and before patent, from giving a mortgage on the land for a debt then contracted or theretofore existing.

From Baker: ROBERT EAKIN, Judge.

Suit by Wm. H. Howard against Ferdinand Reckling and others to foreclose a mortgage. Defendants

appeal from an order sustaining a demurrer to their answer.

AFFIRMED.

Messrs. King & Saxton, for appellants.

Mr. Frank L. Moore, for respondent.

Opinion by MR. JUSTICE WOLVERTON.

This is a suit to foreclose a mortgage on a homestead claim executed by the patentee thereof to plaintiff March 8, 1895, to secure certain indebtedness by him then contracted. The defendants answered, setting up as a defense thereto, that final proof touching said premises was made October 3, 1894, and that the patent was not issued until July 17, 1895, and therefore, that the premises could not be subject to the payment of such indebtedness. To the answer a demurrer was interposed and sustained, and the action of the court in this regard constitutes the only assignment of error. The sole question thus presented is whether a homestead claimant may lawfully incumber his claim with a mortgage to secure indebtedness contracted subsequent to the date of the final certificate and prior to the issuance of the patent. The homestead act provides, among other things, that no lands acquired under its provisions "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor:" Rev. St. U. S. § 2296. This provision of the statute was manifestly designed for the protection of entry men, and to prevent the appropriation of the land in *invitum* to the satisfaction of any debts in-

curred anterior to the issuance of the patent therefor. It is not a limitation or restriction upon any rights the settler may acquire in the land, nor does it operate as a disability forbidding the sale or transfer of his interest therein. It was, as is said by BEACH, J., in *Nycum v. McAllister*, 33 Iowa, 374, "intended as a shield for his protection, and is not a weapon for the destruction of any of his rights." The authorities seem to be uniform in this interpretation of the statute, and, in so far as we have been able to find any case in point, they all hold that after the issuance of the final certificate, and before patent, the claimant may execute a valid mortgage upon the land to secure a debt contracted at the time or theretofore existing: *Orr v. Ulyatt* (Nev.) 43 Pac. 916; *Boggan v. Reid*, 1 Wash. 514 (20 Pac. 425); *Townsend v. Fenton*, 30 Minn. 528 (16 N. W. 421); *Spiess v. Neuberg*, 71 Wis. 279 (5 Am. St. Rep. 211, 37 N. W. 417); *Kirkaldie v. Larabee*, 31 Cal. 455 (89 Am. Dec. 285); *Orr v. Stewart*, 67 Cal. 275 (7 Pac. 693); *Lewis v. Wetherell*, 36 Minn. 386 (1 Am. St. Rep. 674, 31 N. W. 356); *Lang v. Morey*, 40 Minn. 396 (12 Am. St. Rep. 748, 42 N. W. 88); *Cheney v. White*, 5 Neb. 261 (25 Am. Rep. 487); and *Jones v. Yoakam*, 5 Neb. 265. It is sought to distinguish these cases as not applicable to the question in this jurisdiction, because it has been determined here that a mortgage is not a conveyance, but creates a lien only upon the land mortgaged; but several of the cases cited are from states whose courts hold the same doctrine, and the purpose of the statute being to prevent the appropriation of the land against an unwilling party, and not where it has been volun-

tarily incumbered by him, it is clear that there can be no distinction in the principle, as there is none under the authorities. Let the decree of the court below be affirmed.

AFFIRMED.

[Decided at PENDLETON July 31, 1897; rehearing denied.]

MINARD v. STILLMAN.

(49 Pac. 976.)

ATTORNEY AND CLIENT—CONFIDENTIAL COMMUNICATIONS.—In an action against an attorney for money which plaintiff alleges defendant has converted to his own use, and defendant alleges he paid to others at plaintiff's direction, defendant cannot be excused from testifying to whom he made the payments on the ground of confidential communications, though the payment be considered a communication, and defendant was attorney not only for plaintiff, but for the parties to whom the payments were made.*

From Umatilla: **STEPHEN A. LOWELL**, Judge.

This is an action by Mary K. Minard against A. D. Stillman to recover of the defendant a balance of certain collections made by him as attorney for plaintiff upon fire losses on insured property consisting of a dwelling covered by one company, and household goods by another. It is alleged that defendant wrongfully concealed the receipt of such balance from plaintiff, and converted the same to his own use. The defendant admits the receipt of the same, but denies that it was concealed, or converted to his own use or benefit, and alleges that he paid it out by authority, and under the express direction, of the plaintiff. The

* This case is reported in 45 Cent. Law Jour. 314, with a note entitled Recent Cases on Subject of Privileged Communications Between Attorney and Client. For annotated cases discussing this question see *Jordon v. Westerman*, 4 Am. St. Rep. 836; *Hurlburt v. Hurlburt*, 26 Am. St. Rep. 432; *Selp's Estate*, 43 Am. St. Rep. 303.
—REPORTER.

reply put in issue the affirmative allegations of the answer. The defendant became a witness at the trial in his own behalf, and testified, in substance, upon his examination in chief, that the agent and adjuster for the insurance companies represented to him that the drafts for the damages would be drawn payable to plaintiff, but that she was not to get a certain portion of the money, which represents the balance sued for, and that the adjuster did not want such balance to be placed in her hands. When asked why she was not to have such balance, he answered that it was an arrangement between the adjusters and special agents of the insurance companies in the matter of approving the loss. They had declined to approve the loss, and had threatened to arrest W. F. Minard, the husband of the plaintiff, for burning the building, and claimed that the household goods were not in the building at the time it was burned, and that W. F. Minard, who was acting as the agent of the plaintiff touching the adjustment and settlement, understood that such balance was not to be paid to him nor his wife. He further testified that he received the money through drafts upon San Francisco, which were deposited in the First National Bank to his credit, and that the balance in dispute was checked out by him to other parties, and that he received no part of it himself, or to his use or benefit; that when the whole amount was paid, the said W. F. Minard, the agent of the plaintiff, knew perfectly well that such balance was to be used in getting a settlement, and securing proof of these claims, and knew that he could not get them approved without it. On cross-examination he was asked to

whom he paid such balance. This he declined to answer, saying it was a matter of confidence between these other parties, Minard, and himself. The court was thereupon requested to compel the witness to answer, which it declined to do upon the ground that the relation of attorney and client existed between the parties and the defendant. Defendant was then asked whether he had paid any part of it to Minard or his wife, and, having answered in the negative, Minard and his wife consented in open court to his testifying as to whom such balance was paid, and the witness continued: "I desire to state that I refuse to give that information, for the reason that this money was received and disposed of by me upon a matter of confidence. People that did not want to deal directly, and thought they could not deal safely with Ted [W. F.] Minard, dealt with me, and the money was paid out. * * * I was acting as attorney in confidential relations with the other parties." Thereupon the court made the same order refusing to compel the witness to answer, to which an exception was taken and allowed, and, judgment having been rendered in favor of the defendant, the plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. L. Kearney*.

For respondent there was a brief and an oral argument by *Mr. John J. Balleray*.

PER CURIAM. The defendant contends that he occupies the position of attorney both for the plaintiff

and the parties to whom he paid this balance; that the payments to such parties are in their nature privileged communications between attorney and client, and that he ought not to be compelled to make the disclosure.* If it be conceded that this is a case wherein an attorney may properly represent all parties concerned in the settlement and adjustment, the rule seems to be well settled that in a controversy between such parties and a third person the attorney will not be compelled, without the consent of the parties, to disclose any communication made to him by them while in the exercise of such professional employment: *Root v. Wright*, 84 N. Y. 72 (38 Am. Rep. 495); *Gruber v. Baker*, 20 Nev. 453 (23 Pac. 858). Upon the other hand, the rule is as well settled that in a dispute between parties themselves the attorney is not inhibited from making such disclosures where the communication was made in the presence and hearing of all concerned, or was intended for the mutual information of all: *Micheal v. Foil*, 100 N. C. 178 (6 Am. St. Rep. 577, 6 S. E. 264); *Britton v. Lorenz*, 45 N. Y. 51; *Rice v. Rice*, 14 B. Mon. 417; *Carey v. Carey*, 108 N. C. 267 (12 S. E. 1038); *Hughes v. Boone*, 102 N. C. 137 (9 S. E. 286); *Gulick v. Gulick*, 39 N. J. Eq. 516; *Goodwin Gas Stove Company's Appeal*, 117 Pa. St. 514 (2 Am. St. Rep. 696, 12 Atl. 736); *House v. House*, 61 Mich. 69 (27 N. W. 858, 1 Am. St. Rep. 570); *In re Bauer's Estate*, 79 Cal. 304 (21 Pac. 759); *Hanlon v. Doherty*, 109 Ind. 37 (9 N. E. 782). The reason of the latter rule is stated

* NOTE.—Section 712, subd. 2, Hill's Ann. Laws, touching this subject, reads as follows: "An attorney shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment."—REPORTER.

in *Rice v. Rice*, 14 B. Mon. 417, which is, in effect, that as the parties are all present at the same time, or are entitled alike to the same knowledge, the matter communicated is not in its nature private, and consequently that, as between the parties, and in so far as they are or can be concerned, it cannot, in any sense, be deemed a subject of confidential communication made by one which the duty of the attorney inhibits him from disclosing to the other. And in conclusion SIMPSON, J., says: "The statements of parties made in the presence of each other may be proved by their attorneys, as well as by other persons, because such statements are not in their nature confidential, and cannot be regarded as privileged communications."

Now, the case at bar presents a condition of affairs in which there is a dispute between one of the parties and the attorney, and it is contended by the defendant's counsel that the attorney stands in the position of a stranger, and that the rule should be applied as where the controversy is between one of the parties to the communication and a stranger. In this view we cannot concur. If it was a matter of common knowledge between the parties to the settlement as pertains to the persons to whom this balance was paid, the knowledge or the communications by which it was obtained by all cannot be considered as privileged in so far as the parties are concerned, and the attorney is not inhibited by any duty devolving upon him from communicating such knowledge from one to the other. The knowledge would be matter common to all, the attorney included, and for that reason is not privileged, as it concerns them all. So that in a controversy be-

tween one of the parties and the attorney the communication would be a matter of common knowledge between parties to that controversy, and the reason assigned why it is not privileged as between the parties to the settlement is equally as strong, and has like application as between one of the parties and the attorney. The court was therefore in error in not requiring the defendant to answer. The information which the plaintiff sought to elicit would seem to be pertinent to the issue, which was whether defendant had converted any of this money to his own use. He claims that he paid it to certain parties under the direction of the plaintiff, and it is, therefore, an important factor in the logical course of an examination touching the transaction to ascertain and know to whom it was paid, and was, therefore, proper subject-matter respecting which to pursue a cross-examination of the witness. The judgment of the court below will therefore be reversed, and the cause remanded for such other proceedings as may seem pertinent, not inconsistent with this opinion.

REVERSED.

[Decided at PENDLETON July 31, 1897; rehearing denied.]

STEEL v. FARRELL.

(49 Pac. 974.)

TRIFLING ERROR—APPEAL.—A cause will not be reversed for a trifling error—such \$2.25.

From Union: ROBERT EAKIN, Judge.

Suit by R. M. Steel against John Farrell to foreclose a mortgage, resulting in a decree for plaintiff, from which defendants appeal.

AFFIRMED.

For appellants there was an oral argument by *Messrs. J. D. Slater and J. W. Knowles.*

For respondent there were briefs over the names of *C. H. Finn* and *Thos. H. Crawford*, with an oral argument by *Mr. Finn.*

PER CURIAM. The material facts are that on December 27, 1889, the defendants, John Farrell and Amanda, his wife, being indebted to the First National Bank of Island City, Oregon, in the sum of \$3,975.25, executed to it their promissory note for that amount, and desiring to secure the payment thereof, and to obtain further credit, plaintiff, at their request, and for their accommodation, guaranteed to pay the same, and also agreed that, if any payments were made thereon by the makers, he would be liable for such future advances as might be made to them by the bank at any time within three years, not exceeding the amount specified in the obligation; and in consideration for the liability thus assumed Farrell and wife executed to him a mortgage upon certain real property, conditioned that if they made default in the payment of said note or advances, and plaintiff was compelled to pay the same, or any part thereof, the amount so paid should become a lien upon the said premises, and be foreclosed in the manner prescribed by law. On May 22, 1895, Farrell and wife owed the bank the sum of \$3,327.40, and having made default in the payment thereof upon demand, plaintiff paid the same, and brings this suit to recover that amount and interest thereon at the rate of ten per cent. per annum, and to foreclose the lien of his

mortgage. The cause being at issue, a trial was had resulting in a decree as prayed for, from which the defendants appeal.

The defendants' counsel having failed to file a brief at the time this cause came on for trial, obtained permission to make an oral argument, and submit their brief within fifteen days, which have long since expired, without availing themselves of the privilege, notwithstanding which we have carefully examined the evidence, and conclude that it fully supports the findings of the trial court. The record shows that, in addition to the original debt, the defendants were charged with certain sums of money paid at their request on account of taxes levied upon the mortgaged premises, premiums paid for keeping the buildings thereon insured, repairs on the buildings, and the cost of a barn built upon said premises, which, at the time the mortgage was executed, were leased to certain persons, and, as additional security, defendants assigned to plaintiff these leases and the rents accruing thereunder, which when collected, were credited upon the debt to the bank, and this credit was further augmented by money received from an insurance company on account of the loss by fire of a building erected upon the demised premises. Interest at ten per cent. was computed upon the additional indebtedness, and a like rate allowed upon the credits until they exceeded the interest, when they were applied in reducing the principal. In one instance, however, under the date of April 13, 1892, a credit of \$41.65 is allowed on account of rent collected, while a charge of \$43.89 is made on account of interest,

thereby increasing the principal, but in such a small degree as to work no appreciable injury.

Based upon this computation, plaintiff was compelled to pay the bank, under his guaranty, the sum demanded by it, which, at ten per cent. interest, amounts to the sum awarded him in the decree. Counsel for defendants contended, at the argument, that the contract entered into between the parties was to apply the rents collected to the payment of the original debt, and, had this agreement been observed, and the amount received on account of insurance applied in the same manner, plaintiff's liability would have been discharged. Examining the mortgage executed by Farrell and wife, it shows that plaintiff not only guaranteed the payment of the original debt, but also obligated himself to pay all other sums, not exceeding the original amount, that might be advanced by the bank for a period of three years from the date of the mortgage. A fair construction of the terms of this contract leads us to the conclusion that it was understood between the parties to it that, if defendants received additional sums from the bank, the rents so collected should be first applied to the payment of such sums. The original note became due six months after its execution, and bore interest from maturity at the rate of ten per cent. per annum, and the same rate was charged upon all sums so advanced by the bank. While the contract does not particularly specify what rate was chargeable on account, yet it appears that defendants were aware of and practically assented to the computation at the rate adopted. It also appears that Amanda Farrell conveyed to plaintiff one hun-

dred and sixty acres of land which it is claimed he agreed to accept as a payment of the sum of \$1,000 on account of his assumed liability before it had attached. This land, at the time it was so conveyed, was incumbered with a mortgage, and also attached for the grantor's debt; and, while the evidence is quite conflicting, we think there was no agreement to accept this tract as a payment, but the plaintiff holds the legal title thereto in trust for this defendant upon the repayment of his debt and interest. We think the decree complained of is fully supported by the evidence, and hence it follows that it must be affirmed, and it is so ordered.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

RE MURRAY'S ESTATE.

(49 Pac. 961.)

1. **INSOLVENCY—ASSIGNEE'S FINAL REPORT—PRACTICE.**—An assignee for creditors, having discharged the duties of his trust, is entitled, upon filing his final account, to have it settled and adjusted, and all objections thereto passed upon and determined separately. Hence an order disallowing the account in toto is error.
2. **APPEAL—OBJECTIONS NOT MADE BELOW.**—Irregularities in the verification and filing of objections to the final account of an assignee in insolvency cannot be urged for the first time on appeal.

From Grant: **MORTON D. CLIFFORD**, Judge.

Final accounting of Kenneth F. MacRae, assignee of Murray Brothers, insolvent. Upon objections by A. L. Brown, creditor, the account was rejected, and assignee appeals.

REVERSED.

For appellant there was a brief by *Mr. Thornton Williams*, with an oral argument by *Mr. Emmet Williams*.

For respondent there was a brief and an oral argument by *Mr. Errett Hicks*.

Opinion by MR. JUSTICE BEAN.

This appeal brings up for review a decree of the Circuit Court of Grant County, made in the matter of the final account of Kenneth F. MacRae, as assignee of Murray Brothers, formerly partners doing business as stockmen and ranchers in Grant, Harney, and Malheur counties. MacRae was appointed in November, 1891, assumed control and management of the estate January 1, 1892, and filed his final account on May 31, 1894, showing a balance on hand of \$4,256.70, of which he asked to be allowed the sum of \$3,390.37 for his personal services as assignee, and \$866.33 as a balance due for the services of his attorneys. After several ineffectual attempts to bring the matter of the account to a hearing, January 19, 1895, was fixed as the time for hearing objections thereto, and for the settlement thereof, of which due notice was given. On the eighteenth of January, 1895, one of the creditors of the estate filed objections to many items in the assignee's final account, specifying with considerable detail the grounds of such objections. Nothing further, however, appears in the journal of the court in reference to the matter until May, 1896, when the court filed a decision wherein he makes some findings of fact to the effect that the estate had been extrava-

gantly and wastefully managed, but did not pass upon any of the objections made to the final account, except such as pertained to the matter of the allowance to the assignee for his personal service and for the balance due his attorneys. On the twenty-sixth of May the assignee filed a motion, supported by affidavit, for a rehearing, and a re-examination of the matter, and for leave to file a supplemental report. This motion was allowed, and on October 7, 1896, a supplemental report, explanatory of the final account, and in answer to the objections thereto, setting out at great length and with much detail the transactions of the assignee, was filed by him, and the whole matter argued and submitted. On February 8, 1897, the court again filed what are denominated findings of fact and conclusions of law, but which, like the former findings, did not pass upon or determine the specific objections made to the assignee's final report, or undertake to settle his accounts. Upon these findings a decree was rendered that "the final account and report and the supplemental account and report of the said assignee be, and the same are hereby, rejected and disallowed; that the said assignee be, and he is hereby, allowed the sum of \$309.37, in addition to the amount already received by him as per his said final account and report, for his services as such, and the remaining sum now in his hands belonging to the said estate, to wit, the sum of \$3,906.58, the said assignee is hereby ordered to forthwith distribute *pro rata* among the creditors of the estate, and that each creditor have and recover of and from the said assignee his costs and disbursements, taxed at the sum of \$——."

1. From this decree the assignee appeals, and, in our opinion, his appeal must prevail. Having discharged the duties of his trust, and filed his final account, he was entitled to have it settled and adjusted, and the specific objections made thereto passed upon and determined. This was not done, but an order was entered disallowing the account in toto, and ordering the distribution of the funds then in his hands, less the sum of \$390, which he was permitted to retain for his own services; so that, as the matter now stands, the assignee must go to the expense and trouble of filing another final account notwithstanding the fact that the one on file is a full and complete account of his doings as assignee. The estate has been settled, and it only remains for the court to settle and adjust the accounts of the assignee. The proper practice would have been for the court below to have tried and determined the issues made by the objections to the final account, and either allowed it in whole or in part, and in that manner ascertained the sum with which the assignee is properly chargeable, and the amount for which he is entitled to a credit, and thereby settled and adjusted his account so that when he complied with the decree he would be entitled to a discharge and order exonerating his bondsmen. The final account of the business, together with the books, vouchers, and records on file, show all his transactions and his receipts and disbursements with particular and commendable clearness, and upon these records and the objections made to the final report he is entitled to have the matter adjusted, and not be compelled to begin over again.

Although the court may have been of the opinion, from its examination of the record, that the estate had been extravagantly managed or wasted, or that the assignee had failed to account for all the property coming into his hands, or had paid out money for which he was not entitled to a credit, it was not authorized on that account to disallow and reject his final account in toto. It should have tried out the disputed questions either from the record, if that could have been done, and, if not, from extraneous testimony, and made such a decree of final settlement as, in its opinion, the facts justified.

2. It is claimed that the objections were not filed in time, and are not properly verified, but questions of that kind cannot be made in this court for the first time. The case was argued and submitted twice to the court below on the assumption that the objections were properly filed. The only question in the case is the settlement of the final account of the assignee, and as this involves questions of fact which cannot be determined in this court from the record before us, it necessarily follows that the decree must be reversed, and the cause remanded to the court below, with directions to adjust and settle the final account of the assignee; and it is so ordered.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

FISK v. BASCHE.

(49 Pac. 981.)

31 178
88 514

31 178
42 485

OPENING SETTLED ACCOUNTS—BURDEN OF PROOF.—One who seeks to surcharge and falsify a settled account has the burden of proof to establish the facts alleged: *Hoyt v. Clarkson*, 23 Or. 51, applied.

From Baker: ROBERT EAKIN, Judge.

For appellant there was an oral argument by *Mr. F. M. Saxton* (*Mr. Will R. King* of counsel).

For respondents there was an oral argument by *Mr. Frank L. Moore*.

PER CURIAM. This is a suit for an accounting. The facts are that on April 21, 1888, plaintiff and one Henry A. Hyde, as partners, entered into a contract with defendants by which it was agreed that the latter would from time to time ship to them, at Prairie City, Oregon, certain goods, wares, and merchandise, which they agreed to sell and remit the proceeds, less ten per cent. thereof, which they were to retain as their commission; that about April 1, 1889, Hyde assigned all his interest in this contract to plaintiff, who continued to carry out its terms until about October 1 of that year, when he had a settlement with the defendants, wherein there was found a balance against him of \$490, which he settled by delivering certain personal property to defendants in payment thereof. Plaintiff admits having received from defendants large quantities of goods, wares, and merchandise, and that he sold the same, but alleges that he delivered to them

notes, accounts, money, and property far in excess of the value thereof; that defendants agreed to collect said notes and accounts, and render a statement thereof, and pay the plaintiff the amount which might be found due him on final settlement; that they collected about \$2,000 thereon, and applied the same to their own use, refusing to account with or pay to the plaintiff any part of the moneys so collected,—and also alleges such other facts as to give a court of equity jurisdiction of the cause. The defendants deny the material allegations of the complaint, and, as a further defense, aver the accounting, settlement, and delivery of the property in payment of the amount so found to be due, as hereinbefore stated. The plaintiff, after denying the new matter set out in the answer, alleges in his reply that defendants falsely and fraudulently represented to him that after giving him credit for all moneys, notes, accounts and property so received he was indebted to them in the sum of \$1,400, and that, relying thereon and being deceived thereby, he had been induced to turn over to them money and property to that amount in settlement thereof; that thereafter, having learned that such representations were false, and that defendants were indebted to him in a large sum, he made a demand on them for an accounting and settlement of their dealings, but that they refused to comply therewith. The cause, being at issue, was thereupon referred, and the evidence taken, from which the court found that plaintiff and defendants had a settlement of their dealings, which was fair and complete, so far as it could ascertain from the data thereof then in the hands of either party, but that it

was impossible to say from an inspection of their books, in the light of the oral evidence explanatory thereof, what sum, if any, was due either party, and thereupon rendered a decree dismissing the suit, from which the plaintiff appeals.

Plaintiff having alleged in the complaint that he never had an accounting with defendants, and having practically admitted in the reply that he had a settlement with them, which he seeks to avoid, it is contended by counsel for the defendants that to permit him to avail himself of the allegations of the latter pleading would be violative of the rule announced in the case of *Lillienthal v. Hotelling Company*, 15 Or. 371 (15 Pac. 630), to the effect that a plaintiff in an action or suit must recover, if at all, upon the facts stated in his complaint. We have no disposition to controvert the rule established in that case, but, assuming that plaintiff's cause of suit is properly stated, we do not think the evidence submitted at the trial entitles him to the relief he seeks. The original statements of account, as prepared by plaintiff and defendants, and which were used in making, and furnished the basis of, their settlement, are in the record, and that submitted by the plaintiff contains the following item: "Horses, \$490." This is evidently the property delivered to defendants in settlement of the amount then found to be due them, and, while plaintiff seems to think that this item refers to a band of horses delivered for another purpose, he admits offering Basche \$50 to set aside the settlement and open the account. Just after this settlement was effected there was found to be due plaintiff from defendants the sum of \$100,

as salary, which they paid by check drawn on the First National Bank of Baker City, and thereupon obtained plaintiff's receipt, evidencing a payment "in full of all demands to date." The evidence shows that certain errors occurred in entries made by the defendants in their books, and that plaintiff had charged defendants with certain notes delivered to them, but failed to give them credit therefor upon their return to him for collection, so that they are charged with the notes, and also with the money obtained on account thereof.

Assuming, as we have, that the pleadings presented the issue of surcharging and falsifying a settled account, the burden was on the plaintiff to establish the facts so alleged: *Hoyt v. Clarkson*, 23 Or. 51 (31 Pac. 198). In this respect he has signally failed, in consequence of which we are compelled to conclude, as did the trial court, that, if there be any amount due either party, it is not discoverable from a careful examination of the evidence; and hence it follows that the decree must be affirmed, and it is so ordered.

AFFIRMED.

[Decided November 22, 1897; rehearing denied.]

LOVEJOY v. WILLAMETTE ELECTRIC CO.

(31 Pac. 197.)

EVIDENCE OF FRAUD.—An allegation that defendants were guilty of fraud in an action to recover land in introducing in evidence a deed of plaintiff's ancestor to defendants' predecessors, when such deed had, in another action, been adjudged void, is not sustained where the only effect of the judgement in such other action was to determine that the land there in controversy was not in fact a part of that conveyed by such deed.

From Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by Amos Lovejoy and others against the Willamette Falls Electric Company and other allied corporations to set aside a judgment in favor of the defendant corporations rendered in an action at law brought against them by the present plaintiffs to recover the possession of the island in the Willamette River at or near the falls at Oregon City, which was confirmed to the legal assignees of the Willamette Milling and Trading Company as "Abernethy Island," by the eleventh section of the act of congress relating to public lands in Oregon, approved September 27, 1850 (9 Stat. 496), on the ground that such judgment was recovered through a mistake of plaintiffs as to the *locus in quo*, and by fraud on the part of the defendants in introducing in evidence a certain deed executed by the plaintiffs' ancestor in 1863. The complaint, in substance, is: That at the time of the passage of the act of congress of 1850 known as the "Donation Law" there were, and are now, two islands in the Willamette River at or near the falls, one immediately above the other, and separated by a well defined channel, the upper one containing sixteen and one-half and the lower one about one and one-half acres; that the lower one was known and designated at the time as "Governor's Island," or the "Island Mill Property," and is the island confirmed to the assignees of the Willamette Milling and Trading Company by the act of congress referred to; that prior to the passage of such act George Abernethy undertook, by settlement or otherwise, to acquire title to the upper

island, and for that reason it was commonly known and designated at the time as "Abernethy Island"; that thereafter A. L. Lovejoy, the plaintiffs' ancestor, became by *mesne* conveyances the owner in fee simple of the island confirmed to the milling company as Abernethy Island, and also the owner of all the right, title, and interest of Abernethy to the upper island, which was likewise known and designated as "Abernethy Island;" that on February 28, 1863, Lovejoy and wife conveyed by deed to John H. Moore and others, according to the description in the deed, "what is known as 'Abernethy Island,' at the falls of the Willamette River, in Clackamas County, State of Oregon," intending, however, to convey thereby their interest in and to the upper island, and not to the island confirmed to the milling company by the act of congress; that the lower island never was conveyed by Lovejoy to any person, and was owned by him at the time of his death, in September, 1882, and is now owned and in possession of the plaintiffs; that on November 3, 1890, the plaintiffs were informed and believed that one of the defendant companies had taken possession of the lower island, and was proceeding to erect buildings thereon, and, acting under this information and belief, and without visiting the *locus in quo*, or considering the confusion likely to arise out of the similarity of names of the two islands, they began an action of ejectment to recover the possession of "an island in the Willamette River, situated at or near the falls of said river on the east side of said river, at or near Oregon City, in Clackamas County, State of Oregon, being the same island described and confirmed as 'Aber-

nethy Island' in the eleventh section of an act of congress of the United States relating to public lands in Oregon, approved February 27, 1850, with its appurtenances;" that in truth and in fact the defendant in such action was not then in possession or exercising any acts of ownership or possession over the land described in the complaint, but was in possession of the upper island, commonly known as "Abernethy Island;" that, taking advantage of the confusion in names, its lessor filed an answer denying the allegations of the complaint, and alleging title in itself, and pleading the statute of limitations; that the cause went to trial, and the plaintiffs, to maintain the issues on their part, introduced in evidence deeds from W. H. Farrar and wife and James Guthrie, Jr., of date July 9, 1862, conveying to their ancestor, A. L. Lovejoy, "the 'Island Mill Property,' so called, or 'Abernethy Island,' " and also testimony tending to show possession thereof by the plaintiffs and their ancestors since the date of such deeds; that the defendant thereupon, to maintain the issues on its part, offered in evidence the deed from Lovejoy and wife, of date February 28, 1863, conveying to J. H. Moore and associates what is known as "Abernethy Island" at the falls of the Willamette River, in Clackamas County, Oregon, and other deeds through which the defendant claims title, and evidence tending to show continuous possession; that, although the conveyances referred to apparently describe the same premises, the two islands were in truth and in fact separate and distinct tracts of land, and the title thereto deraigned through separate channels; that, owing to the confusion growing

out of this similarity of names, the plaintiffs' attorney became confused, and proceeded to the trial on the theory that the island described in the complaint was identical with that described in the deed from Lovejoy and wife to Moore and associates, of date February 28, 1863; and, when his objection to the introduction of said deed was overruled, he abandoned the case, and judgment was thereupon rendered against the plaintiffs in favor of the defendant; that plaintiffs used all reasonable diligence to avoid the effect of such judgment, and to that end filed a motion for a new trial, which, being overruled, they filed an application to be relieved from the judgment on the ground of the mistake as to the *locus in quo*, which was also denied, and the ruling thereon subsequently affirmed by this court; that in prosecuting the motion to be relieved from the judgment, plaintiffs' sole object was to place the cause in the same position in which it was prior to the trial thereof, for the reason that the Abernethy Island of which the defendants were claiming the possession and the adverse occupancy under the statute of limitations was not the Abernethy Island owned by the plaintiffs, the recovery of which was sought in the action.

The complaint further alleges that in 1870 the defendants' predecessor in interest was in possession of the upper island, claiming title thereto under the deed from Lovejoy and wife to Moore and others, and while so in possession W. C. Johnson and J. L. Barlow brought an action of ejectment against it to recover possession of such island, and were successful; that it was adjudged therein that the defendant had no title

or interest in the island, and that the deed from Lovejoy and wife to Moore and others was held for naught; that the defendants in this suit, and in the action at law as well, knew of this litigation, and the result thereof, but, with intent to cheat and defraud plaintiffs, fraudulently, wrongfully, and deceitfully introduced said deed in evidence, and did thereby mislead, confuse, and deceive the plaintiffs and their counsel on account of the similarity of the names of said islands, and that they were so taken by surprise as to be unable to proceed intelligently with their defense. To this complaint the defendants filed an answer, in which it is denied that there were at the time of the passage of the act of congress of September 27, 1850, or are now, two islands at the falls of the Willamette at Oregon City, east of the channel thereof, and alleges that, although the plats and surveys of the United States now show two islands east of such channel, there is, in truth and in fact, but the one known and designated in the act of congress as "Abernethy Island." After denying the material allegations of the complaint, the answer, for a further and separate defense, alleges that the defendant, the Portland General Electric Company, is the owner in fee simple of the Abernethy Island mentioned and referred to in the donation law, and that it and its predecessors in interest have been in the open, notorious, exclusive, and peaceable possession thereof for more than thirty years, and that neither the plaintiffs nor their ancestors, predecessors, or grantors have been in possession during that time. The proceedings in the action at law subsequent to the judgment therein are then set out in

detail, and pleaded as a bar to this suit. A demurrer to the separate defense being overruled, a reply was filed, and upon the issues thus joined the cause was referred to Hon. W. D. Fenton, to report the facts and the law. The referee having reported in favor of the defendants, and his report having been confirmed, and a decree entered in accordance therewith, the plaintiffs appeal.

AFFIRMED.

For appellants there was a brief over the names of *Dell Stuart*, and *Starr, Thomas & Chamberlain*, with an oral argument by *Messrs. Stuart and Geo. E. Chamberlain*.

For respondent there was a brief and an oral argument by *Mr. Julius C. Moreland*.

MR. JUSTICE BEAN, after making the foregoing statement, delivered the opinion of the court.

Assuming, for the purposes of this case, that a court of equity would, upon the facts alleged in the complaint, if shown to be true, set aside and vacate the judgment rendered in the action at law referred to in the pleadings, and that the proceedings in such action subsequent to the judgment are not a bar to this suit, we pass directly to a consideration of the facts. From the issues as made by the pleadings it appears that the two important questions of fact in the case are: First, whether the deed from A. L. Lovejoy and wife to J. H. Moore and others, of date February 28, 1863, purporting to convey "what is known as 'Aber-

nethy Island,' at the falls of the Willamette River, in Clackamas County, State of Oregon," was intended to and did convey the island confirmed to the legal assignees of the Willamette Milling and Trading Company by the eleventh section of the act of congress approved February 27, 1850. If it did, this case is at an end, because it is conceded that the defendants have succeeded by mesne conveyances to whatever interest Moore and his associates obtained by virtue of the deed referred to, and, this being so, the exact location of the island is a matter of no consequence, so far as any rights of the plaintiffs are concerned. And, second, if the deed did not convey such island, the remaining question is whether the plaintiffs' right of suit is barred by the statute of limitations, and this depends upon the question as to whether the present electric light station is located upon the island referred to and designated in the act of congress of 1850 as "Abernethy Island." Of these questions in their order.

It appears from the evidence that prior to 1841 Dr. John McLaughlin settled upon a tract of land at Oregon City, which was subsequently known and designated in the donation law and on the public surveys of the United States as the "Oregon City Land Claim." As a part of this claim, he contended that a small island, containing two or three acres, in the river immediately in front thereof, belonged to him. But in 1841 or 1842 some persons referred to in the testimony as missionaries took possession of the island under the name of the Willamette Milling and Trading Company, or the Oregon Milling Company, and con-

structed a saw and grist mill and other improvements thereon, and continued by themselves and assignees to occupy the same, notwithstanding Dr. McLaughlin's protest, until the passage of the act of congress of 1850. Soon after they took possession of the island, their right and title thereto became vested in George Abernethy, provisional governor from 1845 to 1849, and the island thereafter became known and designated as "Governor's" or "Abernethy's" Island, or the "Island Mill Property." On April 25, 1849, Abernethy sold the property to Joseph Lane, describing it in the conveyance as that certain portion of land "known as and commonly called 'Governor's Island,' being an island in the Willamette River, at the great falls, and the same on which certain persons known as the Oregon Milling Company some time about the year 1842 constructed a saw and grist mill and other buildings and improvements, and being the same which the party of the first part purchased from said milling company." On May 1, 1851, Lane conveyed the same to R. R. Thompson by a deed describing it as "a certain portion of land situate and being in the great falls of the Willamette River, in the County of Clackamas, and Territory of Oregon, known as and commonly called 'Governor's Island' or 'Abernethy's Island.'" On May 17, 1857, Thompson conveyed to James Guthrie by substantially the same description as in the Lane deed, with the addition that the premises conveyed were "the same island which was confirmed to the Willamette Milling and Trading Company, and their assigns, by the act of congress approved September 27, 1850." On June 9, 1862, James Guthrie, Jr., and W.

H. Farrar and wife, who seem to have acquired some interest in the property, conveyed it by separate deeds to A. L. Lovejoy, in each of which the property is described as "the 'Island Mill Property,' so called, or 'Abernethy Island,' situate at or near the falls of the Willamette River, in Clackamas County, Oregon." We have thus been particular to trace the title from the milling company to Lovejoy, as it shows that the property conveyed to him, and to which he obtained title, was the island upon which the milling company entered in 1842, and constructed their mills, and made their improvements, and that it was known and designated in the deeds under which he held as "Abernethy Island." When, therefore, he conveyed to Moore and his associates in 1863, and in his deed described the property as "what is known as 'Abernethy Island,' at the falls of the Willamette River, in Clackamas County, State of Oregon," the natural conclusion is that he intended to convey the old island mill property. That was the only island to which he had any claim, as shown by the evidence, and was then, and had been for a long time prior to that date, well known and commonly designated and generally recognized as "Abernethy Island." It was not only so known and described in the deeds under which he claimed title, but thirteen years before had been officially so designated by the act of congress. In view of these facts, it seems incredible that Lovejoy, who lived at Oregon City, and who was admittedly familiar with this island, its history and surroundings from the time of its occupation by the milling company down to the time of his conveyance to Moore, could have been so

mistaken or confused about the name as to have undertaken to convey some interest in another tract of land by designating it as "Abernethy Island."

And, more than this, at the time of his deed it was not supposed by the people residing in or about Oregon City that there was any island in the river at or near the falls, east of the channel, except the one upon which the island mills had been situated, and which was known as "Abernethy Island." There was a ledge of rocks, exposed at certain stages of the water, above this island, and extending up towards Canemah, which was subsequently surveyed by authority of the government of the United States, and, after some litigation, determined to be a separate island, and has since been known and designated as "Thompson's Island;" but at the time of Lovejoy's deed it was not known or designated by any particular name, and was generally supposed to be either a part of the main land or a mere extension of Abernethy Island. It is true, the widow of Lovejoy, who was called as a witness in this case, says that there was, and had been all the time prior to the passage of the donation act, and prior to the deed from her husband to Moore, a well-known island in the river above the one upon which the island mills were situated, and that Abernethy claimed some right or title thereto, and for that reason it was known as "Abernethy Island," while the lower island was commonly known as "Governor's Island." But in this she is wholly unsupported by any other testimony, and is evidently mistaken. The maps and plats of the public surveys, as well as the testimony of numerous persons who resided at Oregon City during the

time, and whose business interests were such as to render them familiar with the location of the various islands in and about the falls, clearly show that the only body of land in the river east of the channel, recognized at that time as an island, was the one upon which the island mills were located; and the witnesses all testify that they never heard any other island called Abernethy Island. Looking at these facts, which are practically undisputed, it seems to us that no other fair conclusion can be reached but that Lovejoy intended to, and did by his deed of February 28, 1863, convey to Moore and associates, and that they intended to purchase, all his right, title, and interest in and to the island confirmed to the grantees of the Willamette Milling and Trading Company by the act of congress of September 27, 1850, and known as "Abernethy Island." It is a significant fact, supporting this conclusion, that, although Lovejoy lived in the vicinity for twenty years after the execution of the deed to Moore, no claim was ever made by him, so far as this record discloses, that there was any error in the description in said deed, or that it was not intended to or did not convey the island referred to in the act of congress. Nor was any such claim made by his widow or heirs until after they were defeated in the action at law referred to in the pleadings. Indeed, that action was tried upon the theory that the island referred to in the act of congress was the one described in the deed from Lovejoy to Moore and associates, and Mrs. Lovejoy herself so testified at the time, although she now thinks otherwise. In that action, which was instituted at her instigation, and conducted

under her management, plaintiffs relied solely upon the contention that the deed had never been delivered to take effect as a conveyance; and as soon as it became apparent that they were unable to support that contention by competent testimony the case was admitted to be with the defendant, and a judgment rendered in its favor accordingly. It was not until some time after the rendition of such judgment, and after a motion for a new trial had been denied, that the claim was put forth that there was a mistake in the *locus in quo*, or that the deed in question was not intended to convey the island referred to in the act of congress. It is not at all probable that, if Lovejoy had intended to convey some interest in another tract of land, he would have remained silent for twenty years without asserting any claim to as valuable a piece of property as the lower island is shown by the testimony to have been, or that his widow and heirs would have done likewise, until after their defeat in the action at law referred to. It is contended, or at least it is alleged in the complaint, that this deed was never delivered to take effect. But that question was determined in the action at law, and is not open to consideration here. But, if it was, there is no competent testimony whatever in the record to support it.

It is also claimed that the defendant in the law action was guilty of fraud and deceit in introducing in evidence the deed from Lovejoy to Moore and associates, for the reason that in an action brought against its predecessor in interest by Johnson and Barlow in 1870 to recover the possession of the upper island, or what is known in the record as "Thompson's Island,"

the defendant pleaded title thereto in itself, and relied for proof thereof upon the Lovejoy deed, and that the judgment in such action, being against it, is, in effect, a declaration that such deed is void. But the history of that litigation shows that some time in 1865 one Allen Thompson filed upon, as a pre-emption, what was afterwards surveyed and designated on the maps and plats of the United States as an island in the river immediately above Abernethy Island, and obtained title from the government thereto. This title he conveyed to Johnson and Barlow, who brought an action of ejectment against the People's Transportation Company to recover the possession thereof. In that action the defendant pleaded title to the *locus in quo*, and claimed that the property upon which Thompson had settled was not a separate island, but was in truth and in fact a part of the Abernethy Island referred to in the act of congress; and, so claiming, in order to show their title, offered and introduced the deed in question. The judgment in the action was in favor of the plaintiffs, but its only effect was to determine that the land sued for was not in fact a part of Abernethy Island, and it in no way affects the validity of the deed under which the defendants claim to own the latter island, and hence there was no fraud in introducing it in evidence in the action at law.

If we are right in our conclusion that the deed from Lovejoy and wife to Moore and associates conveyed the island confirmed to the Willamette Milling and Trading Company by the act of congress, the exact location of such island becomes unimportant in

this case, as we have already suggested. Upon that question, however, a vast amount of testimony has been taken, and it seems to have been the principal question of fact discussed before and determined by the referee, and the discussion thereof occupies considerable space in the briefs of counsel. It is perhaps as well, therefore, that we should indicate our views upon the question, without, however, attempting to review in detail all the evidence bearing thereon. The contention for the plaintiffs is that the islands referred to in the act of congress, and which is designated on the official plats of the United States as "lot 8, in section 31, township 2, range 2 east," lies north of and across the chasm from the present light station; while the defendants' contention is that said station is located on such island. There are two practically undisputed facts in this case, which to our minds, seem conclusive of the question. The first is that prior to the act of congress of 1850, Dr. McLaughlin laid out, surveyed, and platted a portion of the Oregon City claim for a town site, and sold and conveyed lots and blocks with reference thereto. Upon the plat so made by him are represented, with reference to the streets and blocks of the town, and particularly blocks 1 and 75, the location of the island then occupied by the assignees of the milling company, the chasm dividing the same from the main land, and a space on the main land north of and across such chasm, designated on the map as a mill reserve. By section 11 of the act of 1850, which took away from Dr. McLaughlin, and set apart for university purposes, the Oregon City claim, it was made the duty of the surveyor-general

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to certify to the commissioner of the general land office all lots or parts of lots sold by him prior to March 4, 1849, and the purchasers or their assigns, in order that patents therefor might issue. In the discharge of this duty, John B. Preston, the then surveyor-general, on November 1, 1851, prepared or caused to be prepared a map or plat showing the survey of lots and parts of lots sold prior to the time specified, and certified to the same for the use and information of the commissioner of the general land office. This map, so far as necessary to any question here, is substantially the same as the prior maps filed by Dr. McLaughlin, and shows substantially the same relative location of the island in question with reference to the streets and blocks of the town. There is no dispute as to the location of blocks 1 and 75, and the testimony shows that the actual measurements made on the ground from these blocks of the distances and the directions indicated on the plats locate the island in question at the place contended for by the defendants, and that the point claimed by the plaintiffs as the true location is within the mill reserve. The other prominent factor in the case is that it is shown by the maps, and is agreed by all parties, that Abernethy Island was separated from the main land by a well defined chasm or gorge through the solid basaltic rock, which appears, from the testimony of John McCracken, who was part owner of and superintendent of the island mills during the winter of 1852, and from the official survey and plats of the island as made by and under authority of the government of the United States in the same year, to be

about one hundred feet wide. Mr. McCracken bases his judgment upon the fact that in the winter of 1852 the water carried off the bridge across this chasm which was used for the purpose of reaching the mill property from the main land, and that he had to get out stringers and beams for a new bridge; that while the water was still high he inquired of people whom he thought would know about the probable width of the chasm, and found the prevailing opinion to be that it was about one hundred feet wide; that, acting on this theory, he cut his timbers for the bridge one hundred and ten feet long, and when he placed them in position on the rocks which formed a natural abutment on either side he thinks he had about five feet to spare on either end. The notes of the official survey of the island made in 1852 show that the beginning point for such survey was a point across this chasm one hundred and five feet from the meander line on the opposite side, so that it is clear that the chasm separating Abernethy Island from the main land was a well defined channel of the river. It is admitted that there is a channel answering this description immediately north of the island upon which the present light station is situated, and the evidence fails to satisfactorily disclose that there is, or ever was, any other such chasm north of that point and between it and block 1 of Oregon City. Taking the information, therefore, to be derived from the McLaughlin and Preston maps, and the fact of this chasm, which is a fixed and certain landmark, it is impossible to reach any other conclusion than that the island on which the old mill was located, and referred to in the act of

congress, is the same one upon which the present light station of the defendant is now located. But, in addition to this, J. W. Meldrum, D. P. Thompson, Capt. Apperson, James Charman, W. C. Johnson, John McCracken, Peter Paquette, and various other persons who lived at and in the vicinity of Oregon City during the time the island was occupied by the Oregon Milling Company, and prior to and since the flood of 1861, —these witnesses, some of whom had exceptional opportunities to observe and know the exact location of this island, and who have been familiar with it from that time until the present, all testify that the light station is upon the same island that was formerly occupied by the milling company, and they say there can be no mistake about this conclusion. In addition to all this, the survey of the engineers who relocated on the ground the government surveys, shows that the island upon which the light station is located accurately and aptly answers the calls in the field notes, and is the only island which does so. So that, however we may view this case, the facts are with the defendants, and the decree must be affirmed.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

STAHL v. OSMERS.

(49 Pac. 958.)

PARTNERSHIP—RIGHTS OF FIRM CREDITORS.*—Simple contract creditors of a partnership have not such a lien upon the assets of the firm as will enable them to follow and subject such assets, or the proceeds thereof, to the payment of the firm debts after all partners have parted with their interest therein.

From MORROW: STEPHEN A. LOWELL, Judge.

Suit by Mrs. J. H. Stahl and others against Dan Osmers and others to compel the vendees of partnership property acquired from the individual partners to account for and apply the proceeds thereof to the payment of partnership debts. The facts are practically undisputed, and the only controversy is about the application of the law thereto. On July 6, 1893, the defendants Dan Osmers and Mat Hughes were partners in the saloon business at Heppner, and were the owners of a stock of wines, liquors, and cigars of the alleged value of \$800, and were insolvent. On that day the partnership property was attached for the individual debt of Osmers at the suit of Ruehl, and un-

*NOTE.—There is a short monograph with the case of *Davies v. Atkinson*, 7 Am. St. Rep. 577, on Misapplication by a Partner of Partnership Property in Payment of Individual Debts. See also *Goldthwaite v. Jamney*, 28 L. R. A. 161 (48 Am. St. Rep. 62), where the learned editors have added to the original opinion very elaborate notes on The Rights of Partnership and Other Creditors to Partnership Real Estate.

The following annotated cases contain a thorough review of the law concerning the application of the assets of insolvent partnerships, the remedies of individual and firm creditors as against each other, and the rights of firm creditors to follow partnership property that has been disposed of by the partners in payment of their private debts: *Yorks v. Toser*, 28 L. R. A. 86 (50 Am. St. Rep. 395); *Smith v. Smith*, 43 Am. St. Rep. 369; *Thayer v. Humphrey*, 51 Am. St. Rep. 911 (30 L. R. A. 549); *Darby v. Gilligan*, 6 L. R. A. 740; *Goldsmith v. Eichold*, 38 Am. St. Rep. 97; *Pott v. Schmeucker*, 57 Am. St. Rep. 425; *Jackson Bank v. Durfey*, 48 Am. St. Rep. 593.

See *Russell v. Clark*, 57 Am. St. Rep. 436, for a monographic note concerning The Levy on Partnership Assets of a Writ Against One Partner Only.—REPORTER.

der an execution on a subsequently recovered judgment his interest therein was sold to the defendant William Hughes for the sum of \$200. On the day following the attachment, the other partner, Mat Hughes, sold and transferred all his interest in the firm property to the defendant John Hughes for the sum of \$600, who, together with the purchaser at the sheriff's sale, took possession of the entire partnership property, and disposed of it for their own use and benefit. The plaintiffs,—who are creditors of the firm of Osmers & Hughes,—having reduced their claims to judgment, and an execution having been issued thereon, and returned *nulla bona*, began this suit on March 10, 1894, to compel the defendants and John Hughes to account for and apply in payment of their judgment the proceeds of the property formerly belonging to said partnership. The decree of the court below was in favor of defendants, and plaintiffs appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Frank Kellogg*.

For respondents there was a brief over the names of *Mr. G. W. Rea* and *Ellis & Lyons*, with an oral argument by *Messrs. Rea and Lyons*.

MR. JUSTICE BEAN, after making the foregoing statement, delivered the opinion of the court.

The complaint charges fraud in the sale and transfer by the defendant Mat Hughes of his interest in the partnership property to his co-defendant, John

Hughes. But this allegation is wholly unsupported by evidence, and therefore the only question for determination on this appeal is whether simple contract creditors of a partnership have such a lien upon the assests of the firm as will enable them to follow and subject such assets, or the proceeds thereof, to the payment of the firm debts after all partners have parted with their interest therein. Upon this question there is some conflict in the adjudged cases, but the great weight of authority favors the doctrine that the firm creditors have no lien in their own right upon the partnership effects, and no direct right to compel their application to firm, in preference to individual, debts. The right to compel such an application of partnership assets is generally regarded as an equity the partners have as between themselves, but, so long as it exists in any of the partners, the creditors may, by a sort of subrogation to the right of the partner, compel its enforcement, and by this means obtain an application of partnership property to their demands. The right of the firm creditor in this respect is, however, a derivative one only, and not held or enforced in his own right; in other words "the equities of the creditors can only be worked out through the equities of the partners." From these premises it necessarily follows that, unless a partner is in condition to enforce such right, the creditors cannot do so. The *quasi* lien, as it is sometimes called, of the creditor, being at best only the resultant of his debtor's lien, it of course can not exist after the debtor has himself ceased to have any lien from which it can be derived. The leading case upon this subject is, perhaps, that of *Case v.*

Beauregard, 99 U. S. 119, in which it was held that transfers made by the individual members of an insolvent firm of their interest in the partnership assets terminated the equity of any partner to require the application thereof to the payment of firm debts, and was, therefore, a complete bar to a bill filed by the partnership creditors for that purpose. But probably no clearer enunciation of the doctrine is to be found than that of Mr. Justice MATTHEWS in *Fitzpatrick v. Flannagan*, 106 U. S. 654 (1 Sup. Ct. 374). He says: "The legal right of a partnership creditor to subject the partnership property to the payment of his debt consists simply in the right to reduce his claim to judgment, and to sell the goods of his debtors on execution. His right to appropriate the partnership property specifically to the payment of his debt, in equity, in preference to creditors of an individual partner, is derived through the other partner, whose original right it is to have the partnership assets applied to the payment of partnership obligations. And this equity of the creditor subsists as long as that of the partner, through which it is derived, remains; that is, as long as the partner himself 'retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce through it the application of those assets primarily to payment of the debts due them, when ever the property comes under its administration.' Such was the language of this court in *Case v. Beauregard*, 99 U. S. 119, in which Mr. Justice STRONG, delivering its opinion, continued as follows: 'It is indispensable, however, to such relief, when the creditors

are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court, and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in *custodiam legis*.' Hence it follows that 'if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end.' "

And in *Schmidlapp v. Currie*, 55 Miss. 600 (30 Am. Rep. 530), the rule is admirably stated by Mr. Justice CHALMERS as follows: "The firm creditors at large of a partnership have no lien on its assets any more than ordinary creditors have upon the property of an individual debtor. The power of disposition over their property inherent in every partnership is as unlimited as that of an individual, and the *jus disponendi* in the firm, all the members co-operating, can only be controlled by the same considerations that impose a limit upon the acts of an individual owner, namely, that it shall not be used for fraudulent purposes. So long as the firm exists, therefore, its members must be at liberty to do as they choose with their own, and even in the act of dissolution they may impress upon its assets such character as they please. The doctrine that firm assets must first be applied to the payment

of firm debts and individual property to individual debts, is only a principle of administration adopted by the courts where from any cause they are called upon to wind up the firm business, and find that the members have made no valid disposition of, or charges upon, its assets. Thus, where, upon a dissolution of the firm by death or bankruptcy, or from any other cause, the courts are called upon to wind up the concern, they adopt and enforce the principle stated; but the principle itself springs alone out of the obligation to do justice between the partners. The only way to accomplish this is to so marshal the assets that property which was owned in common shall be applied to the joint debts, and that which was separately owned shall be applied to the liabilities of its separate owner, so that neither class of creditors shall be allowed to trespass upon the fund belonging to the other until the claims of that other shall have been satisfied. This right of the creditors is, therefore, really the right of their debtors, and inures to them derivatively from the debtors. Hence it is said that the lien or *quasi* lien of the creditor 'is worked out through the partners,' the meaning of which is that the firm creditors may demand the primary application of the firm assets to the payment of their debts, because each one of the partners would have a right to demand this as against his copartners." This doctrine is likewise supported by the following authorities: 2 Bates on Partnership, § 824; Parsons on Partnership, § 246 *et seq.* and note; *Huiskamp v. Moline Wagon Company*, 121 U. S. 310 (7 Sup. Ct. 899); *Goldsmith v. Eichold*, 94 Ala. 116 (33 Am. St. Rep. 97, 10 So. 80); *Jones v. Fletcher*, 42 Ark.

423; *Hawk Eye Woolen Mills v. Conklin*, 26 Iowa, 422; and many others which it is not deemed necessary to cite. The courts of New York (*Menagh v. Whitwell*, 52 N. Y. 146 (11 Am. Rep. 683), and perhaps those of another state or two, seem to hold to a contrary doctrine, but they are decidedly in the minority, and we are not sufficiently impressed with the soundness of the reasons upon which their decisions are founded to follow them in opposition to what we conceive to be the great weight of authority. Applying the doctrine stated to the case in hand, the solution is clear. It is admitted by the complaint that the entire right and interest of each of the partners in the firm of Osmers & Hughes in the partnership property had been sold and transferred long prior to the commencement of this suit, and that neither of such partners had any interest therein at the time the suit was commenced, and hence, under the rule stated, it cannot be maintained. The decree must therefore be affirmed, and it is so ordered.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

KOSHLAND v. NATIONAL INSURANCE CO.

(49 Pac. 845.)

REMOVAL OF CAUSES—PRACTICE—EFFECT OF DENYING MOTION.—Where a petition and bond for the removal of a cause are presented to a state court the only question to be there determined is whether the record shows a *prima facie* right to remove; all questions of fact must be determined by the federal courts.* If the application for removal is denied, the petitioner loses no rights by contesting the case on its merits, and the point is still good on appeal.

*NOTE.—See also *Oreagh v. Equitable Life Assur. Society*, 88 Fed. 849.—REPORTER.

JURISDICTION OF UNITED STATES COURTS—DIVERSE CITIZENSHIP.—Under the provisions of section 1 of the Removal Act of March 3, 1887 (24 U. S. Stat. 552), as amended and corrected August 13, 1888 (25 U. S. Stat. 433), the circuit courts of the United States are given original jurisdiction of civil suits between citizens of different states when the amount in controversy exceeds a certain sum, regardless of whether either party resides in the district where the suit is commenced, but if this jurisdiction arises solely from diverse citizenship, the proceeding can be commenced only in the district where either the plaintiff or defendant resides—in other words, the jurisdiction does not depend on the place of trial, but on the residence of the parties.

IDEM.—The provision in the Removal Act of 1887, as amended in 1888, that where the jurisdiction of the federal courts is dependent entirely on the diverse citizenship of the parties, the cause can be brought only in the district where either plaintiff or defendant resides, confers a personal privilege on the defendant, which he may waive by submitting to the jurisdiction of a federal court of a district where neither party resides. Such a case is always removable to the United States courts at the option of the defendant.*

REMOVAL OF CAUSES—DIVERSE CITIZENSHIP.—An action brought in a state court of Oregon by a resident of California, against a defendant residing in Connecticut, to recover a sum exceeding \$2,000, may be removed by the defendant to the federal court for the District of Oregon, since such a suit is one of which the courts of the United States are given jurisdiction by the first section of the Removal Act of 1887, as amended in 1888.

SUFFICIENCY OF PETITION—CITIZENSHIP OF FOREIGN CORPORATION.—A petition for the removal of a case from a state to a federal court is sufficient on the subject of citizenship when it shows that the petitioner is a corporation organized and existing under the laws of another state and having its principal office in such other state.

RESIDENCE OF FOREIGN CORPORATIONS.—A company incorporated in one state only, and doing business in another state in compliance with conditions imposed upon foreign corporations as prerequisites to their doing business therein, is neither a citizen nor a resident of the latter state, within the meaning of the Act of March 3, 1887 (24 U. S. Stat. 552), § 2, as amended and corrected by Act of August 13, 1888 (25 U. S. Stat. 433), providing for the removal of causes on the ground of non-residence.

From Umatilla: ROBERT EAKIN, Judge.

Action by Marcus S. Koshland against the National

*NOTE.—See also *Crough v. Equitable Life Assur. Society*, 88 Fed. 849.—REPORTER.

Fire Insurance Company of Hartford, Connecticut. There was a judgment for plaintiff and defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Starr, Thomas & Chamberlain*, with an oral argument by *Mr. George E. Chamberlain*.

For respondent there was a brief and an oral argument by *Messrs. John J. Balleray* and *Chas. H. Carter*.

MR. JUSTICE BEAN delivered the opinion of the court.

This action was commenced in the Circuit Court for Umatilla County by Koshland, a citizen and resident of California, against a fire insurance corporation organized and existing under the laws of the State of Connecticut, doing business in Oregon, to recover the sum of \$4,885 for the loss by fire of certain property covered by policy of insurance issued by the defendant. After service of process, and within the time required to answer, the defendant appeared and filed a petition and bond for the removal of the cause to the Circuit Court of the United States for the District of Oregon on the ground of diversity of citizenship; but the court denied the petition and proceeded with the trial, resulting in a judgment for plaintiff. The defendant appeals, assigning as error, among other things, the refusal of the trial court to allow the petition for removal. The consideration of this question naturally takes precedence over the other assignments of error, because if, when the petition and bond had

been filed, a sufficient cause for removal to the federal court was shown on the face of the record, the jurisdiction of the state court was at an end, and all subsequent proceedings therein were *coram non judice* and void; and the defendant lost none of its rights by remaining in that court and contesting the case on its merits: *Railroad Company v. Koontz*, 104 U. S. 5. The question of removal is a federal one, and the courts of the United States have repeatedly held that while a state court is not bound to surrender its jurisdiction on a petition for removal until a case is made out which on its face shows that the petitioner is entitled thereto, when the fact does appear its jurisdiction absolutely ceases, and that of the Circuit Court of the United States immediately attaches, and that all issues of fact made upon the petition for removal must be tried in the federal court. All the state court has a right to determine for itself is whether, on the face of the record, as a matter of law, the petitioner is entitled to a transfer; and an adverse determination involves the risk of having all its subsequent proceedings rendered of no avail if, on appeal or writ of error, it shall be determined that the record on its face shows that when the petition was filed it should have given up its jurisdiction: *Stone v. South Carolina*, 117 U. S. 430 (6 Sup. Ct. 799).

The petition for removal in the case in hand avers that the plaintiff was at the time of the commencement of the action, and still is, a citizen of the State of Oregon; and while, as we have said, it was not open to the plaintiff to raise an issue on the question for trial in the state court, it was nevertheless admitted

on the hearing that the averment in the petition to that effect was not true, but that in fact the plaintiff was and is a resident and citizen of the State of California, and such admission was made a part of the record in the case; so that the question for decision is whether an action pending in the state court between citizens of different states can be removed by the defendant to the Circuit Court of the United States for the district in which the state court is held, when neither of the parties to the action are residents or inhabitants of such district. By section 1 of the act of congress of March 3, 1887, to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts (24 U. S. Stat. 552), as amended and corrected by the act of August 13, 1888 (25 U. S. Stat. 433), the circuit courts of the United States are given original cognizance, concurrent with the state courts, of suits of a civil nature, at common law or in equity, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, in the following cases: (1) Those arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority; (2) those in which the United States are plaintiffs or petitioners; (3) those in which there is a controversy between citizens of different states; (4) those in which there is a controversy between citizens of the same state claiming under grants of different states; and (5) those in which there is a controversy between citizens of a state and foreign states, citizens or subjects. The section then provides that "no civil suit shall be brought before either of said

courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant." Section 2 of the act, after declaring that any suit of a civil nature arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority, of which the courts of the United States are given original jurisdiction by the first section, may be removed by the defendant to the Circuit Court of the United States for the proper district, further provides that "any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state."

It is familiar law that under the federal decisions a corporation is, for jurisdictional purposes, a citizen of the state in which it is organized, and therefore, as the plaintiff is a citizen and resident of the State of California, and the defendant of the State of Connecticut, the present action is admittedly a controversy between citizens of different states, and within the provisions of section 2, just quoted, if it be one "of which the circuit courts of the United States are given jurisdiction by the preceding section." The conten-

tion for the plaintiff is that it is not a controversy of that character, because neither of the parties to the action are citizens or residents of the district of Oregon. But this contention confuses the question of jurisdiction with the place of bringing the suit. The first section of the act of 1887 not only defines the class of cases of which the federal courts are given jurisdiction, but also provides the district in which such suit shall be brought by original process. The clause restricting the place of trial does not affect the question of federal cognizance in any way, and in interpreting the statute it is important not to confuse these two provisions. The one is the personal privilege of the defendant, and for his benefit, and therefore may be waived by him; but the other affects the jurisdiction of the court, and, of course, cannot be waived. By the act in question the jurisdiction of the federal courts depends upon the subject matter of the controversy, or the citizenship of the parties, and not upon the place of trial. When the facts exist upon which the jurisdiction is grounded, any circuit court of the United States may, by consent of the parties, hear and determine the controversy between them. The defendant, however, has a right to insist that the action shall be brought only in the district in which he is an inhabitant when it is not founded upon diverse citizenship, and in a district of the residence of either himself or the plaintiff when it is. But this provision is for his benefit, and does not limit the general jurisdiction of the courts of the United States over the subject matter of the controversy, but only of the person. From the summary already given of the

first section of the act, it clearly appears that the circuit courts of the United States are given jurisdiction of suits of a civil nature, "in which there shall be a controversy between citizens of different states," in which the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000, and this jurisdiction is conferred without any other limitation or restriction whatever. Under this provision it is of no consequence, so far as the mere jurisdiction over the matter in dispute is concerned, whether either of the parties reside in the particular district where the suit is pending or not. It is sufficient for that purpose if they are citizens of different states. The jurisdiction depends upon the fact of diverse citizenship, and not the place of trial. If in fact the parties are citizens of different states, any circuit court of the United States has the right to hear and determine the controversy, if it can obtain jurisdiction of the person.

It is argued, however, that because the section provides, when jurisdiction is founded on the fact of diverse citizenship, that "suits shall be brought only in the district of the residence of either the plaintiff or defendant," no other circuit court of the United States can acquire or exercise jurisdiction of the controversy, even by consent of the defendant. But this provision as to the place of trial is not alone peculiar to the Removal Act of 1887, but is to be found, in substance, in nearly if not quite all the former acts of congress upon the subject; and it has never been regarded as affecting the jurisdiction, in any such sense that it could not be waived by the defendant. It has always been considered as a personal privilege of the

defendant, which he could insist upon or not as he might choose. If an action within the general jurisdiction of the federal courts was brought against him in any of such courts, and he chose voluntarily to appear, it has repeatedly been held that the court has jurisdiction to proceed to judgment against him. In *Ex parte Schollenberger*, 96 U. S. 369, Mr. Chief Justice WAITE, in referring to the question, says: "The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of courts. It is rather in the nature of a personal exemption in favor of the defendant, and is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued any where he pleases, and certainly jurisdiction will not be ousted because he has consented." Indeed, such is the construction given the statutory provision now under consideration by the Supreme Court of the United States. The question was before that court in *St. Louis Railway Company v. McBride*, 141 U. S. 127 (11 Sup. Ct. 982); and Mr. Justice BREWER, after commenting upon the previous decisions of the court, concludes his opinion by saying: "Without multiplying authorities on this question, it is obvious that the party who in the first instance appears and pleads to the merits waives any right to challenge thereafter the jurisdiction of the court on the ground that the suit has been brought in the wrong district." This case was cited with approval in the later case of *Mexican National Railroad Company v. Davidson*, 157 U. S. 201 (15 Sup. Ct. 563).

We take it, therefore, that the provisions of the act

of 1887, requiring the suit to be brought in the district where either the plaintiff or defendant resides, when the jurisdiction depends upon diverse citizenship alone, is merely a restriction with regard to the court in which the suit must be brought, and not upon the general jurisdiction of the federal courts over such controversies; and hence a suit in which there is a controversy between citizens of different states, where the matter in dispute exceeds the limit prescribed, is a suit "of which the circuit courts of the United States are given original jurisdiction" by the first section of the Removal Act of March 3, 1887, and, if brought in a state court, may be removed by the defendant (being a nonresident of the state) to the Circuit Court of the United States of the district in which the state court is held, although neither of the parties to the action are residents or inhabitants of such districts. The great majority of, and, indeed, all, the later decisions of the federal courts upon this question, support this view: *Fales v. Chicago and Milwaukee Railway Company*, 32 Fed. 673; *Vinal v. Continental Improvement Company*, 34 Fed. 228; *Tiffany v. Wilce*, 34 Fed. 230; *Wilson v. Western Union Telegraph Company*, 34 Fed. 561; *Gavin v. Vance*, 33 Fed. 84; *Short v. Chicago and Milwaukee Railway*, 33 Fed. 114; *Loomis v. New York Coal Company*, 33 Fed. 353; *Kansas City Railroad Company v. Interstate Lumber Company*, 37 Fed. 3; *First National Bank v. Merchants' Bank*, 37 Fed. 657; *Burck v. Taylor*, 39 Fed. 581; *Amsinck v. Balderston*, 41 Fed. 641.

It is true, a different construction was given the act by the Circuit Court of the United States for the

Northern District of California in *Yuba County v. Pioneer Gold Mining Company*, 32 Fed. 183, Judges FIELD, SAWYER, and SABIN sitting; but this case was expressly overruled by Mr. Justice FIELD in *Wilson v. Western Union Telegraph Company*, 34 Fed. 561, both Judges SAWYER and SABIN concurring in the opinion. So, too, the case of *Harold v. Iron Silver Mining Company*, 33 Fed. 529, was subsequently overruled in *Kansas City Railway Company v. Interstate Lumber Company*, 37 Fed. 3, in which it was distinctly held that an action pending in a state court between citizens of different states may be removed by the defendant to the federal court, although neither party is a resident of the district. In the opinion in that case Mr. Justice BREWER says that: "Any suit is removable of which any federal circuit court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts does not destroy the general jurisdiction of federal courts, or prevent its removal. Take the case at bar. If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment it rendered would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court?" The same construction has been given the Removal Act of 1887 by the supreme courts of Massachusetts and Maine: *American*

Finance Company v. Bostwick, 151 Mass. 19 (23 N. E. 656); *Craven v. Turner*, 82 Me. 383 (19 Atl. 864).

The case of *Mexican National Railroad Company v. Davidson*, 157 U. S. 201 (15 Sup. Ct. 563), upon which the court below seems to have based its ruling, was an action brought in a state court of New York by a citizen of that state against a Colorado corporation upon a chose in action assigned to the plaintiff by another citizen of Colorado, and subsequently removed into the federal court by the defendant, and is clearly not in point. The court simply held that the action was not removable because the federal court did not have jurisdiction of the subject matter, and consent could not confer such jurisdiction. The act of 1887, in the latter clause of section 1, provides that no circuit or district court of the United States shall "have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of * * * any chose in action in favor of any assignee * * * unless such suit might have been prosecuted in such court * * * if no assignment or transfer had been made." By this provision of the statute the federal courts are expressly prohibited from exercising jurisdiction in an action to recover on a chose in action, except foreign bills of exchange, by an assignee thereof, unless the suit could have been so maintained by the original holder; and hence the case referred to, being of this class, was not one of which the circuit courts of the United States are given original jurisdiction by the first section of the act in question, and of course they could not acquire such jurisdiction by removal from the state court. But in the case at hand the jurisdic-

tion of the federal court is founded upon diversity of citizenship alone, and not upon the subject matter of the controversy; and in such case Mr. Chief Justice FULLER says, in his opinion in *Mexican National Railroad Company v. Davidson*, 157 U. S. 201 (15 Sup. Ct. 563), that the provision of section 1 of the act of 1887, requiring such an action to be brought only in the district of the residence of the plaintiff or defendant, is a personal privilege of the defendant, and may be waived by him, and that section 2, providing for the removal of causes from the state to the federal court, "refers to the first part of section 1, by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought." In view of these remarks, the portion of the opinion relied upon by the court below, that the jurisdiction of the circuit courts on removal by the defendant is limited to such suits as might have been brought in that court by the plaintiff under the first section of the act of 1887, must evidently refer to the portion of the first section dealing with jurisdiction, and not to the provision thereof in reference to the place of trial. In other words, unless the plaintiff could have brought the action in a federal court in the first instance, jurisdiction could not be conferred upon a circuit court of the United States by removal from a state court. We conclude, therefore, that the case is one properly removable to the federal court.

In *Southern Pacific Company v. Denton*, 146 U. S. 202 (13 Sup. Ct. 44), it was held that a corporation organized and existing under the laws of the State of Kentucky was not a resident of the Western District

tion created and existing under and by virtue of the laws of the State of Connecticut; and the petition alleges that it "was at the time of the commencement of this action, and still is, a citizen of the State of Connecticut, and of no other state, and has its principal office and place of business in the City of Hartford, in said State of Connecticut." This has been held sufficient by the federal courts: *Shattuck v. North British Insurance Company*, 7 C. C. A. 386, 58 Fed. 609; *Wilcox Guano Company v. Phoenix Insurance Company*, 60 Fed. 929. "A corporation created by the laws of a foreign country," says Mr. Justice CALDWELL in *Shattuck v. North British Insurance Company*, "does not become a citizen or resident of a state of this Union by merely opening an office in the state and transacting business there; and a petition for removal which shows that the defendant is a corporation chartered by the laws of another state or a foreign country does not have to allege negatively that it is not a citizen or resident of the state in which suit is brought against it, because, in legal contemplation, its residence and citizenship can only be in the state or country by the laws of which it was created, although it may have an office and do business in other states whose laws permit it." Under the decisions of the United States courts a corporation is, for the purpose of jurisdiction, conclusively presumed to be a citizen and resident of the state of its creation, and cannot migrate to or become a resident or inhabitant of another state, although it may by its agents engage in business therein, and, as a condition precedent to its right to do so, be required to comply with certain

or agent engaged in its business within the state. It did not undertake to declare the corporation to be a citizen of the state, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the state. It might likewise have subjected the corporation to the jurisdiction of a circuit court of the United States held within the state, so long as the judiciary acts of the United States allowed it to be sued in the district in which it was found. But such an agreement could not, since congress (as held in *Shaw v. Quincy Mining Company*, 145 U. S. 444, 12 Sup. Ct. 935) has made citizenship of the state, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up noncompliance with that test when sued in a circuit court of the United States."

But it is claimed on behalf of plaintiff that the petition for removal is insufficient, because it does not allege that the defendant is a nonresident of the state. The complaint avers that the defendant is a corporation created and existing under and by virtue of the laws of the State of Connecticut; and the petition alleges that it "was at the time of the commencement of this action, and still is, a citizen of the State of Connecticut, and of no other state, and has its principal office and place of business in the City of Hartford, in said State of Connecticut." This has been held sufficient by the federal courts: *Shattuck v. North British Insurance Company*, 7 C. C. A. 386, 58 Fed.

corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the corporation in obedience to its provisions: *Insurance Company v. Morse*, 87 U. S. (20 Wall.), 445; *Barron v. Burnside*, 121 U. S. 186 (7 Sup. Ct. 931); *Texas Mortgage Company v. Worsham*, 76 Tex. 556 (13 S. W. 384). Moreover, the supposed agreement of the corporation went no further than to stipulate that process might be served on any officer or agent engaged in its business within the state. It did not undertake to declare the corporation to be a citizen of the state, nor (except by the vain attempt to prevent removals into the national courts) to alter the jurisdiction of any court as defined by law. The agreement, if valid, might subject the corporation, after due service on its agent, to the jurisdiction of any appropriate court of the state. It might likewise have subjected the corporation to the jurisdiction of a circuit court of the United States held within the state, so long as the judiciary acts of the United States allowed it to be sued in the district in which it was found. But such an agreement could not, since congress (as held in *Shaw v. Quincy Mining Company*, 145 U. S. 444, 12 Sup. Ct. 935) has made citizenship of the state, with residence in the district, the sole test of jurisdiction in this class of cases, estop the corporation to set up noncompliance with that test when sued in a circuit court of the United States."

And in *Re Hohorst*, 150 U. S. 662 (14 Sup. Ct. 221),

it is said by the same learned justice "that, within the meaning of the judiciary acts, a corporation cannot be considered a citizen and inhabitant, or a resident, of a state in which it has not been incorporated, and that under the act of 1888 (March 3, 1887), a corporation incorporated in one of the United States, and in that state only, cannot be compelled to answer in another state, in which it has a usual place of business, and of which the plaintiff is not a citizen." In *Martin's Administrator v. Baltimore and Ohio Railroad Company*, 151 U. S. 673 (14 Sup. Ct. 533), the right of a corporation organized in one state, and doing business in another by the express license and authority of the legislative power thereof, to remove an action brought against it in the latter state by a citizen thereof, on the ground that it was a nonresident of the state, within the meaning of the act of March 3, 1887, was involved; and the court held that under the provisions of that act a defendant corporation must be created by the laws of another state only in order to entitle it to remove an action brought against it by a citizen of the state in which it was doing business, but that if it is such a corporation, and has not been also created a corporation by the laws of the state in which the action is brought, it may remove the action to a federal court, even if it has been licensed by the laws of the state to act within its territory, and is therefore subject to be sued in its courts. And this case we regard as conclusive upon the question made by the plaintiff, that the defendant insurance company, by complying with the laws of this state in reference to such companies doing business here, became a resident of the

state, and therefore not entitled to remove an action brought against it in one of the state courts to the federal court. It follows that the court below was in error in refusing to surrender jurisdiction of the cause, and that its judgment must be reversed, and the case remanded, with directions to proceed no further in the matter unless its jurisdiction shall hereafter be restored.

REVERSED.

[Decided November 22, 1897.]

ALEXANDER v. LING.

(50 Pac. 915.)

JURISDICTION TO VACATE JUDGMENT.*—A judgment cannot be vacated after the expiration of the term wherein it was rendered on the ground that the trial judge had died before settling and allowing a bill of exceptions, where such bill was filed with the judge, but a copy was not properly served on opposing counsel, and no general order was made continuing all unfinished business.

From Multnomah: HENRY E. MCGINN, Judge.

Action by A. M. Alexander against Moy Ling to recover on a promissory note. From an order vacating a judgment in his favor, defendant appeals.

REVERSED.

For appellant there was a brief over the name of *Woodward & Woodward*, with an oral argument by *Mr. John H. Woodward*.

For respondent there was a brief over the name of *Lord & Potter*.

*NOTE.—On this subject see *Henrichsen v. Smith*, 29 Or. 475.—REPORTER.

Opinion by MR. JUSTICE WOLVERTON.

The facts upon which the sole question in this case hinges are, in brief, as follows: On April 29, 1895, judgment was entered upon the verdict of a jury in favor of defendant and against plaintiff for costs and disbursements, taxed at \$75.50, and plaintiff was allowed thirty days to prepare a bill of exceptions. By subsequent orders of the court the time was further extended to June 24, 1895. On the last named date plaintiff delivered to Judge Hurley, who presided at the trial, his bill of exceptions, but failed to serve a copy upon the opposing counsel, as required by the rules of the circuit court. Judge Hurley died on September 10 following, and Henry E. McGinn was appointed his successor. Nothing further appears to have been done in the matter until September 27, 1895, when a motion was filed to set aside and vacate the judgment, based upon an affidavit suggesting the death of Judge Hurley, and that he had not allowed or settled the said bill of exceptions. The motion was allowed October 7, 1895, and a new trial ordered. In the meantime, and prior to the filing of the motion, the regular term of the court had expired, and the succeeding one begun. Defendant appeals from the order vacating the judgment in his favor. The court has no power to vacate or set aside a judgment after the term at which it is rendered, unless appropriate steps have been taken during the term to that purpose, except that, under section 102 of Hill's Annotated Laws of Oregon, it may at any time within a year relieve a party from a judgment or order taken against

him through his mistake, inadvertence, surprise, or excusable neglect. Plaintiff does not bring himself within the provision of said section, nor is it so claimed; neither can it be said that any steps had been taken to vacate the judgment within the term. Had the settlement of the bill of exceptions been a matter pending, and there had been a general order continuing all unfinished business, as counsel for plaintiff claims, these conditions might have been sufficient to have carried the matter over to the succeeding term, and justified the court in the action complained of. But the transcript fails to show the entry of any such general order; nor do we think the matter was pending upon the settlement of the bill of exceptions, as the plaintiff had failed to serve opposing counsel with a copy thereof, as required by rule No. 20 of that court. The failure to serve the copy as required was, no doubt, the very reason why the bill of exceptions was not settled and allowed by Judge Hurley, as he had ample time to have done so. These considerations render the order appealed from void, as beyond the power of the court to make it, and it is therefore reversed, leaving the original judgment rendered upon the verdict unaffected thereby.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

BARR v. RADER.

(49 Pac. 962.)

31	225
33	376
31	225
46	275

AUTHORITY OF ATTORNEY TO ACCEPT PAYMENT.—An attorney at law, under the general power to represent his client, cannot accept anything other than money in satisfaction of a judgment, except by special authority; thus, an attorney cannot direct a sheriff holding an execution to accept as payment thereon a certificate of indebtedness by a garnishee, for his power and agency do not extend that far.

From Grant: MORTON D. CLIFFORD, Judge.

This is an action by Emmet Barr against George Rader to recover damages for the alleged wrongful seizure, detention, and sale of certain personal property. The facts are that on November 14, 1892, the defendant George Rader, by consideration of the Circuit Court of Grant County, obtained a judgment against the plaintiff, Emmet Barr, for the sum of \$114.24, and caused an execution to be issued thereon, in pursuance of which J. D. Combs, sheriff of said county, by direction of Rader, served a notice of garnishment upon Messrs. Harrer Brothers, who, in answer thereto, admitted that they were indebted to Barr in the sum of \$75, which would become due on July 30, 1893; that the sheriff thereafter collected from Barr the sum of \$52.75, and, considering the answer of the garnishees as payment *pro tanto*, gave him a receipt for the amount of the judgment, and returned the execution; that an alias writ was issued, commanding the sheriff to satisfy the balance due on the judgment, in pursuance of which that officer, by direction of Rader, levied upon a stallion and a hack, the

property of Barr, and on July 10, 1893, sold the latter for \$39.50, and applied the amount so received to the expenses incurred on the execution; and on the same day, having collected from Harrer Brothers the amount admitted by them to be due Barr, the stallion was surrendered to its owner, and the writ returned fully satisfied. Barr thereupon commenced an action against Combs and Rader, which, resulting in a judgment in his favor, the same was on appeal to this court reversed, and a new trial ordered: *Barr v. Combs*, 29 Or. 399 (45 Pac. 776). The cause being remanded, the trial court, in obedience to the mandate, gave a judgment of nonsuit in favor of Combs; but upon the new trial the jury returned a verdict against Rader for the sum of \$300, and, a judgment having been rendered thereon, he again appeals, assigning as error the action of the trial court in admitting certain evidence, refusing to grant a judgment of nonsuit as to him, and in giving certain instructions.

REVERSED.

For appellant there was a brief over the names of *L. Kearney* and *Lucian Everts*, with an oral argument by *Mr. Kearney*.

For respondent there was a brief and an oral argument by *Mr. Thornton Williams*.

MR. CHIEF JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

The right of the plaintiff to maintain this action depends upon the authority of the sheriff to accept as

payment *pro tanto* upon the judgment in the original action the certificate of Harrer Brothers to a notice of garnishment, acknowledging their indebtedness to Barr. The plaintiff contends that the sheriff, on his behalf, entered into a contract with Rader by which it was agreed that the amount so admitted to be due from Harrer Brothers to Barr should be indorsed as a payment on the writ, while the defendant insists that no such agreement was consummated, and that, the amount so admitted to be due from Harrer Brothers to Barr not having been paid, he had the right to issue the alias writ under which the levy, detention, and sale complained of were made. The evidence tends to show that Harrer Brothers had been negotiating with Barr to lease from him a pasture, but, before any agreement to that effect had been entered into, the sheriff, with the execution in his possession, by direction of Rader's attorney applied to them for a statement of the transaction, and, being informed that no agreement had been made, the notice of garnishment was not served. Harrer Brothers, however, had another conference with Barr, who agreed to lease the pasture to them in consideration of their agreement to pay \$75 on the judgment rendered against him. This agreement having been consummated, the sheriff thereupon served the notice of garnishment, to which Grant Harrer, for the firm, furnished a certificate, to which he subscribed his name, thereby admitting the indebtedness, upon obtaining which the officer took the same to the office of Lucien Everts, Esq., attorney for Rader, where he also found the latter, in whose presence it was agreed that the certificate should be

signed by the firm name, whereupon the sheriff obtained the signature of Harrer Brothers and returned the same to Everts. It also appears that Barr and Harrer Brothers had not agreed upon the time when the rent of the pasture should be paid, and when the notice of garnishment was served the latter agreed with Everts that it should become due July 30, 1893. We have given a synopsis of the testimony to explain an instruction of the court as follows: "I also charge you, gentlemen of the jury, that in this case a person like Mr. Rader, who is a judgment creditor in this execution, can either act for himself or by his duly authorized agent. An agent is a person authorized by another to act for him, and, if you believe from the evidence in this case that Mr. Everts was the regularly employed and acting attorney for Mr. Rader in this transaction, any agreement or any contracts made between these parties, Mr. Barr and Mr. Everts, in that capacity, would be the act of Mr. Rader, and he would be responsible for them, and would be bound by the acts of his agent."

An exception to this instruction having been taken, it is contended by counsel for the defendant that an attorney has, by virtue of his general retainer, no authority to satisfy a judgment without payment thereof in money; that while Rader might have accepted Harrer Brothers' certificate to the notice of garnishment as part payment of the judgment, Everts, as his attorney, had no power to do so without special authority from his client to that effect; and that, if plaintiff would rely upon Everts' right to bind his principal, the burden was upon him to show that the

authority existed. "The plaintiff's attorney," says Mr. Freeman in his work on Executions (2d ed.), § 108, "has, by virtue of his general employment in the case, power to direct and control the execution, though he cannot satisfy the writ except upon payment to him of the full amount thereof in money, unless the plaintiff has given him special authority to compromise the debt or accept satisfaction in something not a legal tender. The burden of proving such special authority is upon the party claiming under it, for it will never be presumed." In *Smock v. Dade*, 5 Rand. (Va.) 639 (16 Am. Dec. 780), an execution was returned indorsed, "Not executed, by order of plaintiff's attorney." An alias writ having been issued, the defendant moved to quash the same, contending that the amount for which the judgment was given had been paid to plaintiff's attorney, and in support of the motion gave in evidence a memorandum signed by the latter as follows: "Received 25th November, 1822, from Col. Laurence T. Dade, one hundred and fifty-four dollars and seventy cents, in money; also, the bond of William Quarles for one hundred and seventy dollars and thirty-nine cents, payable in four months, and a draft on Anthony Buck for three hundred dollars, after ten days' sight, which, when paid, will be in full of the execution of James Smock and Peter Smock against him in Orange County Court. Edmond Banks, Attorney." The trial court, on this evidence, having quashed the writ, an appeal was taken; and SUMMERS, J., in reversing the judgment, says: "The authority of the attorney to receive payment of the debt which he is employed to recover we think

well settled; but that authority, in our opinion, does not extend to its commutation without the assent of the client. In relation to Quarles' bond, we regard Banks as the attorney of Dade, not of Smock. On giving an acquittance or receipt for the money, he must have represented the former, not the latter. It was a new engagement, in which all his authority was derived from Dade. To him he must have looked for compensation, and to him he was accountable. To extend the authority of the attorney beyond this limit, without a general discretionary power from the party employing him, would carry the responsibility of the first client into transactions far beyond the first engagement, and which might be induced solely with a view to the profit of the attorney or the accommodation of the debtor."

In *Herriman v. Shomon*, 36 Am. Rep. 261, Messrs. Schulenberg and Company recovered judgment against the defendant, and thereupon assigned the same to plaintiff, who caused an execution to be issued thereon, in pursuance of which a levy was made upon the defendant's stock of goods. Shomon thereupon commenced this suit to restrain proceedings under the writ, claiming that he had delivered to the attorney of Schulenberg and Company a county warrant, which was received as payment *pro tanto* on the judgment. A trial was had, and the court, having found that the judgment had been paid before the issue of the execution, gave a judgment as prayed for, in reversing which BREWER, J., says: "There is no pretense that the plaintiffs in the judgment knew of the action of their attorney, authorized or ratified it, or that he had

any special directions or authority in the matter. He had simply the general authority of an attorney in the collection of a judgment. But this general authority is to receive money only in payment. He can neither sell, assign, nor compromise a judgment, nor receive notes, warrants, goods, chattels, or land in payment. Receiving a county warrant is simply exchanging a judgment claim against a debtor for a claim against a county. It matters not that the debtor is insolvent, and the warrant valid and valuable. The attorney is employed to collect; that is, receive the money due on the judgment, and not to trade the claim for anything apparently or in fact more valuable. The authorities in this direction are clear and abundant." To the same effect, see, also, Freeman on Executions (2d ed.), § 108; Weeks on Attorneys at Law, §§ 240, 242; 3 Am. & Eng. Enc. Law (2d ed.), 363, and notes; Freeman on Judgments (2d ed.), § 463. The instruction complained of is, under these authorities, clearly erroneous; and, such being the case, we are compelled to reverse the judgment and order a new trial.

REVERSED.

[Argued April 6; decided April 19, 1897.]

THOMPSON v. CONNELL.

(48 Pac. 467.)

SURPRISE OR EXCUSABLE NEGLIGENCE.—A judgment entered in violation of an agreement extending the time to answer is one taken through defendant's "surprise or excusable neglect," within the meaning of section 102, Hill's Ann. Laws, authorizing the court, in its discretion, to relieve a party from such a judgment.

DISCRETION DEFINED.—The discretion vested in the trial court by the statute is not a right to be arbitrary, but is rather a duty to decide

31	231
32	62
31	231
34	576
31	231
40	420
31	231
45	23
45	365
45	387
31	231
46	307

certain questions in conformity with the spirit of the law, and in a manner to advance substantial justice.

JURISDICTION OF EQUITY—RELIEF AGAINST JUDGMENT.*—A denial of an application under section 102 of Hill's Ann. Laws to vacate a judgment on the ground of inadvertence, surprise, or excusable neglect is a bar to a suit in equity for the same relief on the same ground.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit in equity by R. H. Thompson against Thomas Connell and the Sheriff of Multnomah County to restrain the enforcement of a certain judgment because it was entered by fraud and deceit. Plaintiff also showed that he had a good defense to the original law action in which the objectionable judgment had been entered. A demurrer to the complaint was sustained.

AFFIRMED.

***NOTE.**—The subject of injunctions against judgments is exhaustively considered in the following voluminous foot notes:—

Injunctions Against Judgments for Matters Arising Subsequently to their Rendition: *Little Rock Railway Company v. Wells*, 30 L. R. A. 580.

Relief in Equity, other than by Appellate Proceedings, Against Judgments, Decrees, and other Judicial Determinations: *Little Rock Railway Company v. Wells*, 54 Am. St. Rep. 218. The particular question discussed in the principal case is referred to at pages 241 and 248.

Injunctions Against Judgments for Errors and Irregularities: *Gum Elastic Roofing Company v. Mexco Publishing Company*, 30 L. R. A. 700.

Injunctions Against Judgments Obtained by Fraud, Accident, Mistake, Surprise, and Duress: *Merriman v. Wallon*, 30 L. R. A. 786.

Injunctions Against Judgments Entered on Confession: *Jno. V. Farwell Company v. Hubert*, 30 L. R. A. 235.

Injunctions Against Judgments in Garnishment Proceedings: *Griggs v. Docter*, 30 L. R. A. 380; 46 Am. St. Rep. 824.

Negligence as a Cause for, and as a Bar to, Injunctions Against Judgments: *Payton v. McQuorn*, 31 L. R. A. 33.

Enjoining Judgments Against or in Favor of Sureties: *Michener v. Springfield Engine Company*, 31 L. R. A. 59.

Injunctions Against Judgments for Want of Jurisdiction or Which are Void: *Texas-Mexican Railway Company v. Wright*, 31 L. R. A. 200.

Injunctions Against Judgments for Defenses Existing Prior to their Rendition: *Norwegian Flou Company v. Bollman*, 31 L. R. A. 747.

Negligence as a Bar in Equity to Relief Against Judgments, wherein is a discussion of the effect of failing to prosecute a remedy by appeal, and the consequence of lack of diligence brought about by the conduct of the adverse party: *Payton v. McQuorn*, 58 Am. St. Rep. 444.

For appellant there was a brief by *Mr. W. H. Adams*, and an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief over the name of *Starr, Thomas & Chamberlain*, with an oral argument by *Mr. Warren E. Thomas*.

Opinion by MR. JUSTICE WOLVERTON.

This is a suit commenced May 30, 1895, to set aside a judgment of the Circuit Court of Multnomah County obtained by Connell against Thompson in an action at law, and, in the meantime, to restrain the enforcement of the same by execution, which judgment it is alleged was obtained by fraud. The fraud complained of is set forth in substance as follows: That after the commencement of the action the plaintiff therein, who is one of the defendants here, and one Charles Hirstel, with intent to deceive the plaintiff, the defendant therein, and induce him not to employ an attorney in the action, represented that Connell would extend the time for answering until October 2, 1893, and that in the meantime it was contemplated the cause would be settled and plaintiff be discharged from his alleged liability; that plaintiff relied upon the said representations of defendant and said Hirstel, and was thereby induced to and did wait until the day named without employing an attorney or appearing in the cause, but that the defendant, wickedly conspiring to take undue advantage of plaintiff, and to defraud him of his rights in the premises, caused judgment to be given and rendered on October 1,

1892, against plaintiff, without his knowledge or consent, and contrary to the said understanding and agreement. Subsequently to the rendition of said judgment the plaintiff applied to the circuit court by motion to be relieved against it, and for leave to file an answer therein, and the application was denied. There was a demurrer to the complaint, which was sustained, and the ruling of the court in this regard is assigned as error.

It is contended, in support of the ruling of the court below, that, the plaintiff having made application to the court in the law action to set aside the judgment, and the application having been passed upon and denied, he is now precluded from prosecuting a suit in equity for the purpose of annulling the same judgment, based upon grounds identical with those upon which the application was founded, and we are of the opinion that the contention is sound. The statute has provided that the court may "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise or excusable neglect": Hill's Ann. Laws, § 102. It was under this section that defendant made his application to have the judgment vacated, and, although it is not directly alleged in the complaint that the application was based upon the same ground that the plaintiff here relies upon for annulling it, we think it may be fairly implied that such was the case. Indeed, it is the only ground upon which he could claim relief either by the motion or suit, if the allegations of

the complaint are true, and they must be so considered for the purposes of the demurrer. The provision above quoted for relief in the action was adequate for the purpose. True, the grant of such relief rests within the discretion of the court, but the discretion here spoken of is an "impartial discretion, guided and controlled in its exercise by fixed legal principles;" "a legal discretion to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to defeat the ends of substantial justice," and for a manifest abuse thereof it is reviewable by an appellate jurisdiction: *Bailey v. Taaffe*, 29 Cal. 422; 1 Black on Judgments, § 354; *Lovejoy v. Willamette Locks Company*, 24 Or. 569 (34 Pac. 660); *Askren v. Squire*, 29 Or. 228 (45 Pac. 779); *Willett v. Millman*, 61 Iowa 123 (15 N. W. 866); *Craig v. Smith*, 65 Mo. 536; *White v. Northwest Stage Co.* 5 Or. 99.

But it is made a question whether the statute comprehends fraud as a ground for such relief. Whether this is so or not, the ground relied upon for the redress sought is clearly within the statute. The plaintiff complains that the defendant caused the judgment to be given and rendered contrary to their understanding or agreement; and if such was the case he was taken by "surprise," and this is one of the enumerated causes. Mr. Black says: "It is probable that the species of surprise primarily contemplated by these statutes is that which results from the taking of a judgment against a party in violation of an agreement or understanding that the case should be continued or not pressed, or not brought to trial, though that is also a kind of fraud." 1 Black on Judgments, § 336, and

Mr. Freeman says: "Fraud practiced in obtaining a judgment is sometimes specified in the statutes as one of the grounds which entitle an innocent and injured litigant to have it vacated. Even if this were not specially enumerated in the statute it would generally be available to the injured party on the ground that it had occasioned the rendition of a judgment against him by surprise or mistake, or under circumstances which as to him might well be deemed excusable neglect": 1 Freeman on Judgments, § 111a. Other authorities attest the availability of such a ground of relief by motion to vacate in the original action: See *Binsse v. Barker*, 13 N. J. Law 263 (23 Am. Dec. 720); *Browning v. Roane*, 9 Ark. 354 (1 Am. Rep. 218); *McIntosh v. Commissioners of Crawford County*, 13 Kan. 171. So that, in either view, whether the acts complained of are such as may be denominated by one of the statutory appellations, or from their general nature and effect fall within the mischief sought to be relieved against, it is apparent that the statute is broad enough to afford ample relief by motion in the action. We hold, therefore, that the statute having provided the plaintiff with a remedy in the original action, competent for the purpose, and he having there invoked it, he is now precluded from invoking equitable relief of like character based upon grounds identical with those there employed. The tendency of modern legislation and practice has been to greatly abridge the necessity for resort to equity by amplifying and enlarging the remedies in courts of law for many of the exigencies which formerly called for equitable interposition, and, while the jurisdiction may in some instances remain

concurrent with that given at law, it cannot ordinarily be invoked when the remedy at law has been employed either with or without avail: *Reagan v. Fitzgerald*, 75 Cal. 230 (17 Pac. 198).

AFFIRMED.

[Decided May 1, 1897.]

FARMERS' LOAN CO. v. OR. PAC. R. R. CO.

(48 Pac. 706; 38 L. R. A. 424.)

31	237
33	531

RAILROAD MORTGAGES—RECEIVERS—WAGES OF EMPLOYEES.—A railroad mortgagee is not liable for unpaid wages or other obligations incurred by a receiver appointed at the mortgagee's instance in a foreclosure suit, although the trust fund is insufficient to pay them, unless such responsibility was imposed by the court as a condition of the appointment, or the continuance of the receiver in office.*

From Benton: J. C. FULLERTON, Judge.

This is an appeal from an order of the Circuit Court of Benton County denying the petition of certain employees of the receivers of the Oregon Pacific Railroad Company for an order requiring the plaintiff in the foreclosure suit in which such receivers were appointed to pay the wages of the petitioners. On October 28, 1890, the Farmers' Loan and Trust Company, as trustees for the bondholders of the Oregon Pacific Railroad Company and the Willamette Valley and Coast Railroad Company, commenced a suit in the Circuit Court of Benton County to foreclose a mortgage on the franchise and property of the defendant corporations, to secure the payment of the bonded

*NOTE.—See note to *Decker v. Gardner*, 11 L. R. A. 480, for a collection of cases on the right of a receiver to apply revenues to running expenses and current obligations; and the distribution of funds realized on foreclosure sales is discussed in 46 Cent. Law Jour. 51. An interesting case on the application of the earnings of a receivership is *Central Trust Company v. Utah Central Railway Company*, (Utah), 60 Pac. 812.—REPORTER.

indebtedness thereof, amounting, as alleged, to \$15,000,000; and, on its motion, T. Egerton Hogg, the president of the corporations, was appointed receiver, and clothed by the court with authority to operate the railroad, and receive the income and earnings thereof. To that end, he was empowered from time to time to employ and discharge all needful assistants, managers, clerks, servants, agents, and employees, at such salaries and compensation as he might deem advisable. Under this appointment, Hogg operated the road as receiver until March 6, 1893, when he was removed, and one Hadley appointed in his place, who continued the operation thereof until January 6, 1894, when he was also removed, and another receiver appointed. Under the management of Hogg and Hadley, the earnings of the road were wholly insufficient to pay the expenses of the receivership, and, as a consequence, the wages of the employees were allowed to fall greatly in arrear, so that, at the time of Hadley's removal, there was due the petitioners herein a very large sum for wages, and no funds whatever were in the hands of the receiver with which to pay it; and we take it (although not directly averred in the petition) that the receiver had exhausted his power to float receiver's certificates. Prior to this time, several unsuccessful attempts had been made to dispose of the road under the decree in the foreclosure suit rendered on the twenty-seventh of April, 1891. In this condition of affairs, some of the employees, despairing, and with reason, as the sequel showed, of ever being able to obtain payment of their wages from either the earnings or the *corpus* of the mortgaged property, filed a petition on January 26,

1894, setting out substantially the facts hereinbefore detailed, and praying an order of the court requiring the plaintiff in the foreclosure suit to deposit in court sufficient money for the payment of their wages. This petition was denied, and hence this appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. George G. Bingham* to this effect:

The receiver is an officer of the court, and his possession is the possession of the court; and the expenses of the receivership, as between the parties, are disbursements, and these payments are to be provided for in the same manner as other disbursements. The receiver having been appointed on the petition of respondent to preserve the property for the benefit of respondent, as between respondent and petitioner in this proceeding, respondent is liable for the payment of the expenses of the receivership: *High on Receivers*, § 2; 20 Am. & Eng. Enc. Law (1 ed.), pp. 13, 14; *Musser v. Good*, 11 Serg. & R. 247; *Tillman v. Wood*, 58 Ala. 578; *Howe v. Jones*, 66 Iowa, 156; *Cutter v. Pollock*, 4 N. D. 205 (25 L. R. A. 377, 59 N. W. 1062).

The amounts sought to be recovered here are necessary expenses incurred at the instance of respondent, and respondent is liable in the first instance: 4 Am. & Eng. Enc. Law (1 ed.), p. 326; *Weston v. Watts*, 45 Hun. 219; *French v. Gifford*, 31 Iowa, 428; *Johnson v. Garrett*, 23 Minn. 565.

The general rule as to costs, both at law and in equity, is that they shall be adjudged to the successful

and against the unsuccessful party: *Radford v. Folsom*, 55 Iowa, 276.

The fact that respondent and defendants are great corporations will not change the rules of law applicable to the liability of either of them to pay costs. Supposing, for instance, that a suit is instituted to foreclose a chattel mortgage on two hundred head of cattle, the mortgage not providing the manner of foreclosure, and the complaint charging that the mortgager with neglect and with permitting the stock to perish for want of suitable feed. A receiver is appointed at plaintiff's request and he has to buy feed and care for the stock, and on a sale the stock does not sell for enough to pay charges. Who would be liable? We think any one would say that the plaintiff in the suit would have to pay all expenses, and that he could have a judgment over against the defendant. In a case like the above we think there would be no question raised as to plaintiff's liability. Yet that is in substance the same as what we now have before the court.

In this suit respondent wanted the property cared for, for its ultimate benefit. It asked the court to take charge of and manage this property for its use. It encouraged the court in incurring the present obligations and now leaves the matter for the court to worry with.

Trustees under railroad mortgages have an inherent equitable right to be reimbursed all expenses reasonably incurred in the execution of the trust and for such expense they have a lien upon the trust property. This right goes even further than this, for if the trust property prove insufficient to reimburse the trustees for their proper expenses and reasonable

compensation, they may call upon the bondholders in whose behalf the trust was created, to pay them. In the case of *Tome & Hambleton v. King & Sterling*, 64 Md. 166-184, it is said: "If the fund in court be not sufficient to afford adequate compensation and indemnity to the receivers, the parties at whose instance they were put upon the property should be required to provide the means of payment." In this case the property did not sell for enough to pay receiver's charges. Where the business of the receiver is to manage the property, as a railway, and keep it a going concern, he is regarded more properly as a trustee for the parties: *Jones on Railroad Securities*, § 547; *Tome v. King*, 64 Md. 166; *Vermont R. R. Company v. Vermont Central R. R. Company*, 50 Vt. 500; *Langdon v. Vermont R. R. Company*, 54 St. 593; *Rensselaer Southern R. R. Company v. Miller*, 47 Vt. 146; *McLane v. Placerville R. R. Company*, 66 Cal. 606.

Allowances may be made from time to time during the receivership: *Special Bank Commissioners v. Franklin Institution for Savings*, 11 R. I. 557.

This proceeding is the same as that sanctioned in the following cases: *Mitchell v. Downing*, 23 Or. 448; *Schneider v. Sears*, 13 Or. 76; *City Bank v. Tucker*, 7 Colo. 220; *Hill's Ann. Laws*, §§ 554, 555; *Cutter v. Pollock*, 4 N. Dak. 205 (25 L. R. A. 377).

For respondent there was an oral argument by *Mr. H. C. Watson*, with a brief over the names of *Turner, McClure & Rolston* and *John Rodell Bryson*, to this effect.

The commission and expenses of a receiver must be paid out of the fund, and cannot be taxed against the complaint: *Hembree v. Dawson*, 18 Or. 474.

When the fund is not sufficient to pay these debts, no one of the parties can be said to be benefited by the receivership, unless, indeed, it be those very claimants, whose rights arose out of the receivership, but for whose existence they would have had no claims: *Quincy R. R. Company v. Humphreys*, 145 U. S. 97; *Texas R. R. Company v. Rust*, 17 Fed. 275; *Central Trust Company v. Wabash R. R. Company*, 23 Fed. 863; *Ames v. Union Pacific R. R. Company*, 60 Fed. 966; *New York & Pennsylvania R. R. Company v. New York & Western R. R. Company*, 58 Fed. 278.

The character of receivers is really two-fold: Firstly, they take charge of the property, to hold it pending the litigation. In this respect, they resemble a sheriff, and their custody is in the nature of an equitable execution. Secondly, they operate the property, as the railroad company would have had to do, for the protection of the rights of public and parties alike. In this latter respect, their position is peculiar. They are *sui generis*, and so are their contracts: *Vanderbilt v. Central Railway Company*, 43 N. J. Eq. 669.

Their debts incurred in the operation of the property are chargeable as a lien upon it: *Wallace v. Loomis*, 97 U. S. 162. But beyond the giving to these receivers' debts a lien upon the property, the court cannot go: *Galveston R. R. Company v. Cowdrey*, 78 U. S. (11 Wall.), 459; *Dow v. Memphis R. R. Company*, 124 U. S. 652; *Union Trust Company v. Illinois Midland Railway Company*, 117 U. S. 460; *Kneeland v. Am-*

erican Loan Company, 136 U. S. 89; *Myer v. Western Car Company*, 102 U. S. 1; *Farmers' Loan Company v. Central R. R. Company*, 7 Fed. 538, 17 Fed. 758; *Turner v. Peoria R. R. Company*, 95 Ill. 134 (35 Am. Rep. 144); *State v. Edgefield R. R. Company*, 6 Lea, 353; *Davis v. Gray*, 83 U. S. (16 Wall.), 218; *Booth v. Clark*, 58 U. S. (17 How.), 331; *Corey v. Long*, 43 How. Pr. 498; *Deven-dorf v. Dickinson*, 21 How. Pr. 276.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

This is, so far as we can ascertain, the first recorded instance in the judicial history of railroad receiver-ships in which the trust fund was insufficient to pay the employees of the receiver engaged in the operation of the road; and hence we are unaided in the determination of the question before us by any judicial decision directly in point. The contention of the petitioners seems to be that a receiver of a railroad appointed in a suit to foreclose a mortgage on the road, and clothed with authority to operate it, is as much the representative of the plaintiff as a sheriff who levies upon property under a writ of attachment, and that the operating expenses incurred by him are costs or fees of the litigation, and, like the fees of the sheriff in the case referred to, are collectible from the plaintiff. But this argument is based upon an entire misapprehension of a railroad receiver's position and duties. He is not, like a sheriff in an attachment action, the agent of the plaintiff in the litigation, nor does the plaintiff have any control or authority over him whatever. He is agent and executive officer of

the court, which, by virtue of its high prerogative powers, lays its judicial hand upon the property which is the subject of controversy and controls and operates it for the use and benefit, not of either of the parties to the litigation, but for the public and whomsoever in the end it may concern. His acts and possession are the acts and possession of the court. His contracts and liabilities in contemplation of law are the contracts and liabilities of the court. The parties to the litigation have not the least authority over him; nor have they any right to determine what liabilities he may or may not incur. His authority is derived solely from the act of the court appointing him, and he is the subject of its order only. "A receiver of a railroad," says Mr. Justice CALDWELL, "is a person appointed to receive and preserve the property of a railroad company, and is clothed with authority to operate the railroad and receive the earnings and income therefrom during the pendency of the foreclosure suit. In contemplation of law, the railroad is in the custody of, and operated by, the court appointing the receiver. The receiver is the agent of the court. He is an officer of the court, and his possession of the property is the possession of the court. He is not the agent of either party to the suit, and neither party is responsible for his contracts or for his malfeasance or misfeasance in office. * * * The liabilities incurred by the receiver in the operation of the road are, strictly speaking, the liabilities of the court appointing the receiver." 30 Am. L. Rev. 161. And in *Quincy Railroad Company v. Humphreys*, 145 U. S. 82, the court, speaking of the Wabash receivers, said:

"They were ministerial officers appointed by the court of chancery to take possession of and preserve, *pendente lite*, the fund or property in litigation; mere custodians, coming within the rules stated in *Union National Bank v. Bank of Kansas City*, 136 U. S. 223, 236, where this court said: 'A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property from that time into his custody as an officer of the court, for the benefit of the party ultimately proved to be entitled, but not to change the title, or even the right of possession in the property.' "

So, also, in the case of *New York & Pennsylvania R. R. Company v. New York & Erie R. R. Company*, 58 Fed. 268, it is said: "Receivers are but officers and agents of the court. While necessarily much is committed to their judgment and discretion, yet their power depends upon the decrees and directions of the courts appointing them. Receiverships of railroad properties are in a large part peculiar appointments. Railroads, as public carriers, are charged with great public duties, and the public are interested that their operation shall be continuous. Creditors are likewise interested that there shall be no cessation in their maintenance as going concerns, because their value as property depends upon the active use of the line." These considerations have developed the present well settled proposition that such receivers are the mere custodians of the property, and hold for and as mere agents of the court. Speaking of the character of such

trustees, and the effect of such holding upon the interests procuring the appointment, Chief Justice WAITE said: "The possession taken by the receiver is only that of the court, whose officer he is, and adds nothing to the previously existing title of the mortgagees. He holds, pending the litigation, for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place: *Fosdick v. Schall*, 99 U. S. 251; *Quincy R. R. Company v. Humphreys*, 145 U. S. 82. A receiver represents no particular interest or class of interests. He holds for the benefit of all who may ultimately show an interest in the property. He stands no more for the creditor than the owner. They are not assignees, and the principles of common law applicable to assignees do not define or determine the character of a receiver's possession, or its effects upon the rights of those interested in the property in their possession. Receivers ought not to be appointed to represent the peculiar interests of one class." To the same effect, see *Texas Railway Company v. Rust*, 17 Fed. 275; *Central Trust Company v. Wabash R. R. Company*, 23 Fed. 863; *Ames v. Union Pacific Railroad Company*, 60 Fed. 966; and *Union Trust Company v. Illinois Midland R. R. Company*, 177 U. S. 455.

A railroad receiver is therefore more than a mere custodian of the property, like a sheriff holding under a writ of attachment or execution. He is, in effect, the hand of the court which holds the property while it operates the road pending the litigation for the benefit

of the general public, as well as the creditors of the insolvent corporation. It is for this reason that the expenses of the receivership are chargeable as a lien upon the property superior to all other liens. The plaintiff, at whose instance the receiver is appointed, thereby consents to the absolute control and management of the mortgaged property by the court and its agents and to the priority of claims for the expenses incurred in its operation and management; but it is not perceived upon what ground it can be claimed that, because the expenses of the receivership are allowed without any fault of his to exceed the value of the mortgaged property, thus entirely destroying his security, he must, in addition to the loss of his debt, be compelled to make good the deficit, unless the order of appointment was made upon that condition. He has no control over the acts of the receiver, and if, without his consent, he is to be held responsible therefor, he is liable to absolute bankruptcy and ruin. Such a rule would render the plaintiff's position so uncertain and precarious as practically to preclude him from any protection whatever through the appointment of a receiver pending the foreclosure suit. But the inquiry is made, "shall not a railroad mortgagee who applies for and obtains the appointment of a receiver, with authority to operate the road, be held responsible for the liabilities incurred by such officer when they cannot be made out of the property itself?" We think not, unless such responsibility was imposed as a condition to the appointment or the continuance of the receiver in office. The appointment of a receiver in a suit to foreclose a railroad mortgage is not

a matter of strict right, but rests in the sound judicial discretion of the court; and it may, as a condition to issuing the necessary order, impose such terms as may, under the circumstances of the particular case, appear to be reasonable, and, if not acceded to, may refuse to make the order: 30 Am. L. Rev. 161; *Fosdick v. Schall*, 99 U. S. 235.

If, therefore, upon an application for the appointment of a railroad receiver, it appears probable that the income and corpus will prove insufficient to pay the expenses and liabilities thereof, we have no doubt that the court may require of the plaintiff, as a condition to such appointment, a guaranty of the payment of the expenses of such officer. And if, at any time after the appointment has been made, it becomes apparent to the court that it will be unable to pay and discharge the present or future liabilities incurred by its executive officer and manager, it should refuse to continue the operation of the road under the receiver, unless its expenses are guaranteed. No court is bound or ought to engage or continue in the operation of a railroad or any other enterprise without the ability to promptly discharge its obligations, and, unless it can do so, it should keep out or immediately go out of the business. But, unless such terms are imposed as a condition of the appointment or continuation in office of the receiver, his employees must look to the property in the custody of the court and its income for their compensation. They have no claim whatever on any of the parties to the litigation. They are the employees and servants of the court, and not of the parties. Their wages are in no sense costs of the liti-

gation; and, although incurred during the progress of the suit, they are not incurred in the suit. They are neither expenses of the plaintiff, nor of the defendant, and are not fees or costs which can be charged against the successful party to the litigation, as is sought to be done in this case. It follows that the order appealed from must be affirmed, and it is so ordered.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

GOLDSMITH v. BAKER CITY.

(49 Pac. 973.)

31	249
a31	291
a31	399
32	439.
31	249
34	277

CHARACTER OF CITY WARRANTS.—Ordinary city warrants are only *prima facie* evidence of municipal indebtedness, and do not constitute a final adjudication against the city of the claims which they represent.

ACTION AGAINST CITY—WARRANT—MANDAMUS.—The holder of an unpaid city warrant is not restricted to his remedy by mandamus, but may maintain an action at law and reduce his claim to judgment, although, under section 852, Hill's Ann. Laws, no execution can be issued thereon.

From Baker: **ROBERT EAKIN**, Judge.

This is an action by Barney Goldsmith against Baker City to recover the sum of \$2,403.26 alleged to be due upon certain city warrants issued to various persons and assigned to plaintiff. The complaint contains fifty-three separate causes of action, and, the averments of each being substantially the same, except as to the date, name, and amount, it will be sufficient for the purpose of the question involved to set out the allegations of the first cause of action, which are as follows: "The defendant is and at all times herein mentioned was a municipal corporation, incor-

porated, organized and existing under and pursuant to the laws of the State of Oregon; that on October 1, 1890, defendant executed and delivered to one Lene Small its certain warrant in words and figures following, to wit:—

‘Class B. BAKER CITY, October 1st, 1890. No. 75
To the Treasurer of Baker City, Oregon: \$1.25

Pay to Lene Small, or bearer, one and 25-100 dollars, for 5 drills to Sept. 20. Fire; and charge to the general fund. By order of the common council.

S. B. McCORD,
Mayor.

WM. H. PACKWOOD, SR.,
Auditor and Clerk.’

That on February 2, 1891, said warrant was duly presented to the treasurer of defendant, and payment thereof then demanded; that payment was then refused and said refusal was indorsed in words and figures following, to wit: ‘Presented Feb. 2nd, 1891. No funds; this warrant draws interest from this date at 8 per cent. per annum. Page 82. Vol.—. B. F. Murphy, City Treasurer’; that prior to the bringing of this action said Small sold said warrant, and for a valuable consideration assigned all his interest therein to plaintiff; that no part of said warrant, principal or interest, has been paid.” The court below sustained a demurrer to the complaint on the ground that an action at law cannot be maintained on the warrants in suit, but that the remedy is by mandamus, and plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Walter S. Perry* and *Milton W. Smith*, with an oral argument by *Mr. Perry*.

For respondent there was a brief over the name of *King & Saxton*, with an oral argument by *Mr. Will R. King*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

By section 352 of Hill's Ann. Laws it is provided, in effect, that no execution shall issue on a judgment recovered against a public corporation of the state, but that upon the presentation of a certified transcript of the docket, and memorandum of the satisfaction thereof, the proper officer of the corporation shall draw an order on its treasurer for the amount of the judgment in favor of the person for whom the same was given, and which order shall thereafter be presented for payment and paid with like effect and in like manner as other orders upon the treasury of the corporation. In view of this provision of the statute, the defendant contends that the only remedy on a city warrant is by mandamus, because all the plaintiff could obtain on a judgment in his favor in an action at law would be another warrant issued in the manner provided by the statute, and he would therefore be in no better position than before. But, although no execution can issue on a judgment recovered against a municipal corporation, it does not follow that the holder of a city warrant like those in suit should be denied the right to sue the municipality thereon, and

reduce his claim to a judgment. These warrants are but evidence of indebtedness, and constitute no final adjudication, as against the city, of the claims which they represent. They afford *prima facie* evidence that the city is legally indebted to the holder thereof, but do not conclude it on that point. They are, in legal effect, nothing more than nonnegotiable promissory notes of the city, open to all defenses in the hands of *bona fide* holders available as between the original parties: *Clark v. City of Des Moines*, 19 Iowa, 199 (87 Am. Dec. 423); *Wall v. Monroe County*, 103 U. S. 77. As said by Mr. Justice FIELD in the case last referred to: "There has been a great number of decisions in the courts of the several states upon instruments of this kind, and there is little diversity of opinion respecting their character. All the courts agree that the instruments are mere *prima facie*, and not conclusive, evidence of the validity of the allowed claims against the county by which they were issued. The county is not estopped from questioning the validity of the claims, and when this is conceded the instruments conclude nothing as to other demands between the parties." And to the same effect are 1 Dillon on Municipal Corporations, § 487; 1 Daniel on Negotiable Instruments, § 427; 1 Randolph on Commercial Paper, § 337. This being so, it would be competent for the defendant to urge their invalidity as a ground for refusing to pay the warrants in question; and, as an action at law is the simplest and most efficient way of determining that question, no good reason can be suggested why the plaintiff may not resort to it, and reduce his demands to judgment, if he is able to do so,

and thus conclude defendant's liability thereon. The question as to what benefit he may derive from a judgment in his favor, or how he will proceed to enforce its payment, can cut no figure at this time. The right of action in the plaintiff, and the liability of defendant to suit, exist; and the courts cannot shut their doors against the plaintiff because he may have to resort to a proceeding by mandamus, in lieu of an execution, to enforce the payment of any judgment which he may recover.

As said by Mr. Justice COLB in disposing of a similar objection in *Terry v. City of Milwaukee*, 15 Wis. 545: "It may be said that a party obtaining judgment against the city on one of these school orders will be in no better condition than before, but will have to resort to a mandamus to compel the city authorities to levy and collect a tax to discharge it. This may all be true, but it still affords no satisfactory reason why he should be deprived of his action upon the orders. The remedy may not advance him much towards realizing his money, but the courts cannot shut their doors against him on that ground. If they are just and legitimate claims against the city, he is entitled to his remedy, although that remedy may not be very effectual for the purpose for which it is invoked." And in *City of Connersville v. Connersville Hydraulic Company*, 86 Ind. 184, where the question was squarely presented as to whether a city should be sued upon a warrant drawn upon the treasurer by the proper officers, or whether the holder of the warrant must proceed by mandate, the court, speaking through Mr. Justice ELLIOTT, says: "There can be no doubt as to

the right of the holder of a corporation order or warrant to maintain an ordinary civil action upon it, nor can there be any doubt that he is not bound to resort to the extraordinary remedy of mandate. It is well settled that ordinary actions may be maintained against municipal corporations upon their contracts as well as for their torts. Demands against a municipal corporation may be reduced to judgment in like manner as similar demands against natural persons, and, where any ordinary civil action will attain this end, it is never necessary to resort to the extraordinary remedy of mandate. It is true that the public property cannot be seized upon execution, but this does not affect the right to sue and obtain judgment. It is one thing to obtain a judgment, and another thing to enforce its collection." This same rule is recognized, either directly or indirectly, in the following cases: *Travelers' Insurance Company v. City of Denver*, 11 Colo. 434 (18 Pac. 556); *Clark v. City of Des Moines*, 19 Iowa 199 (87 Am. Dec. 423); *International Bank v. Franklin County*, 65 Mo. 105 (27 Am. Rep. 267); *Mills County National Bank v. Mills County*, 67 Iowa, 697 (25 N. W. 884); *Knapp v. Mayor of Hoboken*, 38 N. J. Law, 371; *Simmons v. Davis*, 18 R. I. 46 (25 Atl. 691). The doctrine prevails generally in this country that a judgment against a public corporation cannot be enforced by an ordinary execution, but, notwithstanding this fact, the conflict in the adjudged cases is not whether the holder of a city warrant may maintain an action thereon, but whether he must not do so, and reduce his claim to a judgment, before he is entitled to the extraordinary remedy of mandamus.

In the courts of the United States a judgment at law is necessary to support such writ (*Davenport v. Dodge County*, 105 U. S. 237), and the same rule prevails in many of the states, while in others resort may be had to mandamus in the first instance. But, so far as we have been able to ascertain, the case of *Cloud v. Town of Sumas*, 9 Wash. 399 (37 Pac. 305), stands alone in holding that the remedy on an ordinary city warrant is exclusively by mandamus, and that no action thereon can be maintained. And we are not sufficiently impressed with the soundness of the reasoning of the court in that case to follow it in opposition to the great weight of authority. The case of *State v. Dodge County*, 10 Neb. 20 (4 N. W. 370), would seem, at first glance, to announce the same doctrine as *Cloud v. Town of Sumas*; but this decision was predicated on the provisions of the statute authorizing the creation of the liability in suit, and therefore cannot be well regarded as in point in this discussion. It follows from these views that the court below was in error in sustaining the demurrer to the complaint, and the judgment must be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

TALBOT v. GARRETSON.

(49 Pac. 978.)

31	256
31	314
31	256
37	448
37	449
38	208
31	256
40	410
31	256
42	327
31	256
48	315

1. AMENDMENT OF PLEADINGS—NEW CAUSE OF ACTION.—It is within the power of the court, under section 101, Hill's Ann. Laws, to allow a party to file before trial an amended pleading containing a new cause of action or defense material to the subject matter of the controversy then before the court; although the original cause cannot be abandoned, and an entirely different one substituted: *Foste v. Standard Insurance Company*, 26 Or. 449, distinguished.
2. RESTORING MORTGAGE LIEN—EQUITY.—Before a court of equity can restore the lien of a mortgage canceled by mistake it must appear that at the time of such release the mortgagee did not know of the intervening lien over which he desires to obtain priority.
3. CONSTITUTIONAL LAW.—ENTRY OF DEFAULT JUDGMENT BY CLERK.—Section 249, Hill's Ann. Laws, which authorizes the clerk, on application of plaintiff, where no answer is filed, to enter the default of defendant, and enter judgment against him for the amount specified in the summons, is not unconstitutional as attempting to confer judicial power on the clerk: *Crawford v. Beard*, 12 Or. 447, approved and followed.

From Umatilla: STEPHEN A. LOWELL, Judge.

This case was commenced on August 27, 1896, by H. C. Talbot to enjoin the sale of certain land belonging to the plaintiff under an execution issued on a judgment against his grantor, J. L. Craft, and in favor of defendants Garretson, Woodruff, Pratt & Company, for the sum of \$4,000, rendered on April 1, 1896, on the ground that the judgment was entered without jurisdiction, and is absolutely void. The original complaint alleged title in plaintiff, the issuance of the execution on defendants' judgment, the levy thereof and the advertisement of the land for sale, the invalidity of the judgment, and prays for an injunction. After the issues had been made up, but before the

trial, the plaintiff, by leave of the court, filed an amended complaint which contained substantially the same averments as the original, and, in addition, alleged that at the time the plaintiff purchased the land in question, his father was the owner of two certain mortgages thereon, which were prior in time and superior in right to the lien of defendants' judgment, and which were duly assigned and transferred to him, and subsequently cancelled and released; that such releases were made and executed by mistake, and were not intended to release or cancel the lien of the mortgages upon the premises, but for the sole and only purpose of conveying and giving to the plaintiff the right, interest, and title of his father therein. The complaint, as amended, prayed for a decree enjoining the threatened sale under execution, as in the original complaint, but, if that could not be done, that the mortgages be restored and the cancellation thereof annulled. The defendants moved to strike the amended complaint from the files on the ground that it set up a new and distinct cause of suit from that alleged in the original complaint, and, this motion being overruled, they moved to strike out all the allegations thereof in reference to the mortgages and their cancellation, on the ground that the facts thus stated were immaterial, and constituted no part of a cause of suit against the defendants. This motion was likewise overruled, and, upon issues being subsequently joined by answer and reply, the case was tried, and a decree rendered in favor of plaintiff, restoring the mortgages as liens upon the premises in question su-

perior in right to the lien of the defendants' judgment, and from this decree defendants appeal.

REVERSED.

For appellants there was an oral argument by *Mr. John J. Balleray*, with a brief over the name of *Balleray & Butler*, to this effect:

The amended complaint entirely changed the issues in the case and substituted a different cause of suit, and one that was not even squinted at in the original. The court had no right, as a matter of law, to allow such an amendment, and the motion to strike out should have been allowed: *Sears v. Missouri Mortgage Loan Company*, 56 Mo. App. 122; *Heman v. Glann* (Mo.), 31 S. W. 589; *Union Pacific Railway Company v. Wyler*, 158 U. S. 285 (15 Sup. Ct. 877); *Foste v. Standard Life Insurance Company*, 26 Or. 449 (38 Pac. 617); *Ricker v. Curtis*, 30 N. Y. Sup. 940; *Zboynski v. Brooklyn City Railroad Company*, 30 N. Y. Sup. 540; *Rossel v. Rosenberg*, 30 N. Y. Sup. 812; *Pomeroy on Remedies and Remedial Rights*, §§ 435, 595, 596; *Blalock v. Equitable Life Assurance Society*, 73 Fed. 655; *Flanders v. Cobb*, 88 Maine, 488 (34 Atl. 277); *Smith v. Smith*, 38 N. Y. Sup. 551; *Shafreman v. Jacobs*, 36 N. Y. Sup. 428; *Lawry v. Lawry*, 34 Atl. 273; *Gould v. Gleason*, 10 Wash. 477; *Waggy v. Scott*, 29 Or. 386 (45 Pac. 774).

Another matter is that there is no allegation and no evidence to show that D. Talbot did not know all about this judgment when he satisfied the mortgages. All the cases which hold that a cancelled mortgage may be restored under certain circumstances and

made prior to subsequent liens are cases where the cancellation was made without knowledge or notice of such existing liens: *Hanlon v. Daugherty*, 109 Ind. 87 (9 N. E. 782); *Barnes v. Mott*, 64 N. Y. 398 (21 Am. Rep. 625); *Watson v. Dundee Mortgage Company*, 12 Or. 474 (8 Pac. 548); *Pearce v. Buell*, 22 Or. 33; *Kern v. Hoteling*, 27 Or. 205 (50 Am. St. Rep. 710).

For respondent there was an oral argument by *Mr. A. D. Stillman*, with a brief over the names of *J. W. Brooks*, and *Stillman & Pierce*, to this effect:

Amendments are allowed in furtherance of justice, and are allowed or refused in the discretion of the trial court; and the supreme court will not interfere unless in a plain case of abuse of discretion: *Hexter v. Schneider*, 14 Or. 184; *Hodges v. Tennessee Fire Insurance Company*, 8 N. Y. 416; *Smith v. Billett*, 15 Cal. 26; *Bowles v. Doble*, 11 Or. 474, p. 481; *Pierson v. McCahill*, 22 Cal. 128; *Morrison v. Lovejoy*, 6 Minn. 224; *State v. Mayor*, 18 Iowa, 389; *Branson v. Oregon Railway Company*, 11 Or. 160; *Swift v. Mulkey*, 14 Or. 59, p. 63.

The amendment in this case was plainly in furtherance of justice, and fairly allowed by the circuit judge in the exercise of a sound judicial discretion. It was such an amendment as is contemplated by the statute, and in no way changed the cause of suit, or misled or prejudiced the defendants: *Henderson v. Morris*, 5 Or. 25; *Pierson v. McCahill*, 22 Cal. 128, p. 132; *Stringer v. Davis*, 30 Cal. 318; *Smith v. Yreka Water Company*, 14 Cal. 201.

The rule is well settled that a mortgage upon real property for the purchase price (as this was) has pri-

ority over prior judgment liens, and if the deed and mortgage are delivered at the same time, it does not matter if they were in fact, signed on different days: *Kern v. Hotaling*, 27 Or. 205 (50 Am. St. Rep. 710); *Dusenberry v. Hurlburt*, 59 N. Y. 541; *Lafayette v. Erb*, 8 Atl. 62; *Roane v. Baker*, 11 N. E. 246; *Maybury v. Brien*, 15 Pet. 21; Jones on Mortgages, §§ 464, 366.

The plaintiff held the fee, and the assignment to him of the mortgages did not operate as a merger. The rule is well settled that where the fee is acquired by the mortgagee, merger will not take place where it is to his interest that it should not do so: Jones on Mortgages, § 869; *Watson v. Dundee Mortgage Company*, 12 Or. 476; *Woodward v. Davis*, 53 Iowa, 696; Pomeroy's Equity Jurisprudence, § 791, and notes; *Westheimer v. Thompson* (Idaho), 32 Pac. 205.

The plaintiff being the owner of the mortgage, his father (the original mortgagee), at plaintiff's request released both mortgages. This was done in ignorance of the existence of defendant's judgment, and certainly not with the intention of creating in the defendant a superior right in the premises.

The rule is firmly fixed that a mortgage discharged of record will be reinstated when it has been released of record by one who bought the premises subject to the mortgage, and in ignorance of a judgment lien inferior in right to the mortgage, and having caused it to be satisfied under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake, and give him relief by reinstating the mortgage. If, under such circumstances, he has paid the mortgage, equity will give him the benefit of the

equitable right of subrogation: *Pearce v. Buell*, 22 Or. 29; *Kern v. Hotating*, 27 Or. 205 (50 Am. St. Rep. 710); Jones on Mortgages, § 876, p. 732; *Barnes v. Mott*, 64 N. Y. 397; *Young v. Morgan*, 89 Ill. 199; *Stimson v. Pease*, 53 Iowa, 572; *Bruce v. Nelson*, 35 Iowa, 157; *Geib v. Reynolds*, 35 Minn. 331 (28 N. W. 929); *French v. De Bow*, 38 Mich. 709; *Cobb v. Dyer*, 69 Me. 494; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 205; *West's Appeal*, 88 Pa. St. 341; Jones on Mortgages, §§ 966, 971.

MR. JUSTICE BEAN, after making the foregoing statement, delivered the opinion of the court.

1. The defendants contend, at the outset, that the court had no right, as a matter of law, to allow the amended complaint to be filed, because it purposed to add a new and distinct cause of suit not embraced in the original complaint. The statute (Hill's Ann. Laws, § 101) provides that: "The court may, at any time before trial, in the furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party; or other allegation material to the cause, and, in like manner and for like reasons, it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended by striking out the name of any party or by correcting a mistake in the name of any party or a mistake in any other respect or when the amendment does not substantially change the cause of action or defense by conforming the pleading or proceeding to the facts proved." The construction of this section has been much discussed, and, while it must be regarded as settled that a new cause of action

cannot be inserted by way of amendment on the trial (*Foste v. Standard Insurance Company*, 26 Or. 449, 38 Pac. 617), the question as to whether it may be done before trial has never been decided here, and the decisions elsewhere are conflicting. By one class of cases—of which *Board of Supervisors v. Decker*, 34 Wis. 378, is an example—it is held that a party cannot, under the form of an amendment before trial, change the scope of his action, or insert a new cause of action. But it is believed that this view is not in harmony with the great weight of authority, or the reason and spirit of the statute. In New York, under a statute practically the same as ours, the courts, after apparent vacillation, finally established the rule that an amendment before trial, setting up a new cause of action or suit, is permissible if in furtherance of justice, but that the power to grant amendments upon the trial is restricted to such amendments as do not change substantially the cause of action or defense: 1 Rumsey's Practice, 284; *Brown v. Leigh*, 49 N. Y. 78; *Hatch v. Central Bank*, 78 N. Y. 487; *Freeman v. Grant*, 132 N. Y. 22 (30 N. E. 247).

In *Brown v. Leigh*, 49 N. Y. 78, the original complaint was to compel the determination of conflicting claims to real property, but under a statute providing that any pleading may be once amended by the party of course without prejudice to proceedings already had, the plaintiff served an amended complaint which set forth a cause of action in ejectment. This was stricken out on motion, upon the ground that it embraced a new and different cause of action from that set forth in the original complaint. From this order

an appeal was taken, and Mr. Justice GROVER, after referring to the fact that some of the courts of the state had held that the statute only gave the right to amend and perfect what was previously set out in an imperfect manner, and that others had held that a new cause of action or defense might be set up, says: "I think the construction adopted in the former cases too strict, and subversive of the true meaning of the section in this respect. That gives a party power to amend any pleading once without imposing any restriction upon it. The term 'pleading' includes all the pleadings of both parties. The 'complaint' is the statement of the plaintiff's cause or causes of action. It is this statement or complaint that may be amended and perfected by the party so as to enable him to present his entire case upon trial. It is not confined to an amendment of such matter as has been defectively stated in the original complaint. The same remarks apply to the answer. This is a statement of the defense and of any counterclaim or claims. It is this statement that may be amended by the party so as to enable him to avail himself of all his defenses upon trial. It follows that new causes of action may be included in the complaint, and those in the original left out, and new defenses or counterclaims embraced in the answer. That this was the intention of the legislature clearly appears from the last clause of section 173, Code Procedure [which is similar to our section 101], by which the power of the court to grant amendments upon the trial by conforming the pleading to the facts proved is restricted to such amendments as do not change substantially the claim or defense. The

insertion of the restriction shows that the legislature, in its absence, understood that such change might be made under the power conferred. There is no such restriction in section 172, nor upon the general power conferred upon the court to allow amendments conferred by section 173. Were the power to amend upon trial unrestricted, parties might be compelled to litigate matters of which they had no notice, and for which they were unprepared, and injustice thereby done; but there is no such danger where the amendment is made before trial, so that the adverse party may come fully prepared to meet." It is quite true, this decision was made under a section of the New York statute in substance the same as section 99 of our code, but it was no more liberal as to the character of the amendment which may be made than the first clause of section 101, now under consideration. The only difference is that in the one instance the amendment may be made as a matter of course, while in the other it can only be done by leave of the court, and in furtherance of justice; and therefore the reasoning of Judge GROVER in the case referred to is just as applicable to the case in hand, and to the proper construction of the first clause of section 101, as it is to the construction of the section of the New York statute which he was then considering. The section quoted plainly provides for two classes of amendments, one made before trial and the other after the trial has begun, and before the final submission of the case. In the former, no limitation is placed upon the power of the court to allow an amendment except that it must be "in furtherance of justice," and, if a

new allegation is added, it must be one "material to the cause"; while in the latter the power is restricted to such amendments as do not substantially change the cause of action or defense.

It follows, we think, that it is within the power of the trial court to allow, before trial, an amended complaint to be filed containing a new cause of action or suit material to the subject matter of the controversy then before the court. A plaintiff cannot, of course, abandon his original cause of action or suit, and substitute an entirely new and different one, because in such case the new pleading would not be an amendment, but a substitution for the original. But so long as the amendment is germane to the subject matter of the controversy, we can see no objection to the court, in the exercise of a sound discretion, allowing the pleadings to be amended in furtherance of justice by inserting new and additional allegations material to such controversy, although they may, in effect, constitute a new cause of action or defense. That this is the intention of the statute is, it seems to us, made manifest from the latter clause of the section under consideration, which specially restricts the amendments made on the trial to such as do not substantially change the cause of action or defense. This construction is in harmony with the rule governing the allowance of amendments, which has in view the determination of the actual controversy with as little expense and delay as possible. "While the parties are in court," says Chief Justice STRAHAN, "they ought to be permitted to shape their pleadings in such form as they may be advised, so as to present

the real questions at issue that the same may be determined with as little delay and expense as possible. Nothing is ever gained by turning a party out of court, or compelling him to take a nonsuit, on account of some defect in his pleadings not discovered, perhaps, until during the progress of the case, when an amendment could supply the defect, and the action or suit be brought to an early determination": *Baldock v. Atwood*, 21 Or. 73 (26 Pac. 1058). As illustrating the power of the court, under a statute similar to ours, to allow the pleadings to be amended, the case of *Hatch v. Central Bank*, 78 N. Y. 487, is instructive. In that case the original complaint alleged, in substance, that plaintiff purchased of defendant what purported to be four United States treasury notes for \$1,000, which were counterfeited. Upon issue joined the plaintiff had judgment for the amount paid for the counterfeit notes, with interest; but, after this judgment had been paid and satisfied, the court granted a motion that it be opened, and the satisfaction thereof cancelled, and that plaintiff be allowed to serve an amended complaint, adding a count setting forth the purchase of four other similar counterfeited notes, which it was claimed was omitted from the original complaint by mistake, on condition that the plaintiff refund and repay the amount of the judgment which had been paid, and upon compliance with certain other terms and conditions, although the effect of such amendment was to avoid the statute of limitations. The order allowing this amendment was affirmed on appeal, the court, through Mr. Justice DANFORTH, saying that "it was going a great way to

grant the relief sought, but the application was not without merit, and was one which, under a long series of authorities, the court had power to grant." Within this construction of the statute, supported by the authorities cited, the court had power to allow the amendment sought to be made in this case, although it would have added an additional ground for relief to that contained in the original complaint. It was not intended to change the real gist of the controversy between the parties, or the subject matter of the litigation. The original purpose of the suit was to determine the rights of the respective parties and their priorities in and to the real property in question; and the allegation of any fact material to the controversy, either as a ground of relief or as a defense, could, within the discretion of the trial court, in our opinion, be permitted by amendment before trial.

2. Nevertheless the statement of the new matter in the amended complaint as filed is clearly insufficient as a basis for the relief sought, because it is not alleged that the cancellation of the mortgages was made in ignorance of the defendants' judgment. It is unquestioned that a court of equity will, in a proper case, restore the lien of a mortgage cancelled by mistake; but before it will do so it must be made to appear that at the time of the cancellation or release the mortgagee did not know of the intervening lien. This is so elementary that its mere statement is sufficient. Manifestly, a mortgagee who, with complete knowledge of the existence of another lien on the mortgaged premises, deliberately cancels and releases his security, cannot subsequently ask a court of equity to re-

store him to his original priority. For this reason the allegations of the amended complaint concerning the mortgages in question and their cancellation were wholly immaterial, and the motion to strike them out ought to have been sustained. Nor can it be said that this defect was cured by the verdict—if it could be so cured—because there is not a scintilla of proof in the record anywhere to show that the mortgagee did not know of defendants' judgment at the time he released his mortgage. It follows, therefore, that the court below erred in entering a decree giving the cancelled mortgages priority over defendants' judgment, because there is neither allegation nor proof to support it.

3. The only question remaining for discussion is as to the validity of such a judgment. The contention is that it is void because entered by the clerk in vacation, under section 249 of Hill's Ann. Laws, which provides that, if no answer be filed within the time specified within the summons, or such further time as may have been granted by the court, or judge thereof, the clerk, upon the application of plaintiff, shall enter the default of the defendant, and immediately enter judgment against him for the amount specified in the summons. The contention is that this statute is unconstitutional and void, because it attempts to confer judicial powers upon the clerk. But this point was made and decided adversely to the plaintiff's contention in *Crawford v. Beard*, 12 Or. 447 (8 Pac. 537), and this decision has become a rule of property, and ought not at this late date be disturbed, whatever the view of the individual members of the court as now constituted may be upon the question here suggested. The

decree of the court below is therefore reversed, and the complaint dismissed, without prejudice, however, to another suit to restore the cancelled mortgages referred to in the amended complaint if the plaintiff shall be so advised.

REVERSED.

[Decided March 16, 1896; rehearing denied.]

ROSE v. WOLLENBERG.

(—L. E. A.—, 44 Pac. 382.)

SURETIES—PAROL AGREEMENT AS TO RELATIVE LIABILITY—STATUTE OF FRAUDS.—A contract between cosureties fixing the proportion and extent of their several or correlative liability as between themselves is not within the statute of frauds.

From Douglas: J. C. FULLERTON, Judge.

The facts out of which this case arose are in effect as follows: On June 21, 1892, the plaintiff and defendant became sureties upon the official bond of one V. L. Arrington who had theretofore been elected treasurer of Douglas County. Arrington defaulted, and on December 23, 1893, judgment was taken against him and his bondsmen, which was satisfied by plaintiff and defendant each paying one half or \$11,828.65. As touching the contractual relation of the parties with each other, the plaintiff alleges "That at the time plaintiff and defendant so became such sureties on said official bond of V. L. Arrington, it was agreed and stipulated by and between plaintiff and defendant that their liabilities, as between themselves as sureties on said official bond of V. L. Arrington, should not be joint or equal, but that the liability of plaintiff should

31	269
36	154
31	269
47	71
47	72

be a one third proportion and that of the defendant should be a two thirds proportion of any liability that might occur under said bond to said sureties." Plaintiff by this action seeks to recover the difference between one third and one half of the liability incurred, amounting to \$4,003.55. The following is a copy of the bond, omitting matter of inducement and formal parts:

"We, V. L. Arrington as principal, and Aaron Rose and Hyman Wollenberg, hereby undertake, that if the said V. L. Arrington shall not faithfully pay over, according to law, all moneys that may come into his hands by virtue of said office, that we, or either of us, will pay the State of Oregon the sum of thirty thousand (\$30,000) dollars.

V. L. ARRINGTON, [Seal.]

\$10,000 AARON ROSE, [Seal.]

H. WOLLENBERG, [Seal.]

The sureties joined in the justification, the plaintiff justifying for ten thousand and the defendant for twenty thousand dollars.

The allegation above quoted having been put in issue by the answer, a jury was called, whereupon the plaintiff, after putting the bond in evidence, testified as a witness in his own behalf, in substance, that Arrington, Wollenberg, and the county clerk, G. A. Taylor, were present when he signed the bond, and that the figures "\$10,000.00" were placed in front of his name at the time he signed, and continuing said: "I was to assume \$10,000.00 and Wollenberg \$20,000.00, this is the way I understood it." And upon cross-examination further said: "All the contract I suppose I

had was when I signed for one third and he for two thirds. I supposed I had to pay one third and him two thirds, that is all the contract. * * * I signed for security for Mr. Arrington, and at the same time I said distinctly that I would not go for more than one third, and Mr. Wollenberg said he would go for \$20,000." Arrington testified as follows: "Two or three days before the signing of the bond, several days before, I went to Marks' store there, and asked him if he was willing to sign as my surety again, and I went into the bank and asked S. C. Flint if he was willing to go on my bond. Mr. Wollenberg was there, and he expressed himself there voluntarily; says, 'I am willing, and will go on your bond.' He asked me who else were going on. I told him Aaron Rose and Asher Marks. * * * I asked them all to meet me there (at the clerk's office) on the twenty-first of June, so as to put the jurat on the bond. I asked Rose and Wollenberg to meet me there on that morning to justify on the bond. When this matter in regard to the signing occurred Mr. Marks was not there. I went into my room out of the clerk's office for my hat, to go and get Mr. Marks to complete the business. When I came out of the room Mr. Wollenberg met me in the corridor, and said 'You need not go for Mr. Marks, I will take the rest of the bond.' " The witness further stated, in effect, that after the defalcation Wollenberg admitted his liability on the bond to the extent of \$20,000, and, upon cross-examination, that at the signing and in the presence of Taylor, Wollenberg and himself, "Mr. Rose said he would be liable for one third of the bond, and instructed Mr. Taylor to prefix

the figures \$10,000 as he would sign for one third of the bond." G. A. Taylor, the clerk, gave his version of the execution of the bond as follows: "As near as I can remember the matter, these parties came into the office and wished to fix the bond out before me, the justification, and they told me—I do not know which one it was told me—how they wanted it fixed, and how it should read, and according to the instructions received from the parties at that time, I filled it out, and fixed it in the amount of \$10,000 and \$20,000, and put the figures \$10,000 in front of Mr. Rose's name, at the request of the parties, I do not know which one told me to do that." This is in substance all the testimony offered; and, the plaintiff having rested, the defendant moved for nonsuit, which was granted by the court, and judgment entered against plaintiff for costs from which he appeals.

REVERSED.

For appellant there was a brief over the name of *William W. Cardwell*, with an oral argument by *Mr. Rufus Mallory* and *Mr. Cardwell*.

For respondent there was a brief and an oral argument by *Mr. J. W. Hamilton*.

MR. JUSTICE WOLVERTON, after making the foregoing statement, delivered the opinion of the court.

The question presented by this record is, whether the alleged agreement between the plaintiff and defendant "that the liability of plaintiff should be a one third proportion and that of the defendant should be

a two thirds proportion of any liability that might occur under said bond to said sureties," not having been entered into in writing, is within the statute of frauds and perjuries, and therefore void; and, if not, another question arises, and that is whether the evidence presents a *prima facie* case sufficient to go to the jury. It is settled by *Durbin v. Kuney*, 19 Or. 71 (23 Pac. 661), that, as between cosureties, where one of their number has paid more than his proportion of the common liability, no special agreement having been entered into between themselves, the law raises an obligation upon the part of the other cosureties to repay him the excess which he has been compelled to pay, upon the principle that where there is a common liability equality of burden is equity. Formerly equity alone entertained jurisdiction to compel contribution, but latterly courts of law, having borrowed the jurisdiction, are competent, in most cases, to administer relief. It is said in the case cited "that the doctrine of contribution does not depend upon contract, but is bottomed and founded upon principles of natural justice. The contract upon which they are co-debtors or sureties only expresses the relation between them and their creditor, and is entirely distinct from the right of contribution, which exists between themselves." While the law, upon principles of natural justice, raises the obligation of equitable contribution among cosureties, it by no means follows that they are inhibited from fixing or determining their relative liabilities by express contract or agreement among themselves. Indeed, the right to enter into any agree-

ment in respect of such liability as their discretion or judgment may dictate is not questioned. The important question is whether such contracts or agreements are within the statute of frauds, requiring all contracts for the debt, default, or miscarriage of another to be contained in some note or memoranda in writing, expressing the consideration, signed by the party to be charged: (Hill's Ann. Laws, § 785). It is well settled that the true relations existing between joint, or joint and several, promisors or obligors upon a note or bond, or other instrument of writing, can be shown by parol, whether principals or sureties. The writing is paramount, and fixes liability as it pertains to the payee or obligee, but, as between the makers or obligors, their correlative undertakings, whether in the capacity of principals or sureties, may be otherwise established. The principal who has obtained the benefit of the contract or suffered the forfeiture of his bond or obligation is always bound to indemnify his surety who has sustained loss upon his account, and he cannot interpose the statute of frauds to prevent it. But when we go a step farther, to the proposition which involves the undertaking of one surety to indemnify another, in whole or in part, against liability upon their principal's obligation, or, as is alleged in the case at bar, an agreement between themselves fixing upon a different ratio of liability than that which the law raises or implies, we find much contrariety of opinion and authority as respects the enforcement of such undertaking or agreement where it rests in parol.

The earliest case to which our attention has been called is that of *Thomas v. Cook*, 8 B. & C. 727. It

there appeared that one person requested another to become surety with him for a third party under promise of indemnity against payment. In deciding it *BAYLEY, J.*, says: "Here the bond was given to Morris as the creditor, but the promise in question was not made to him. A promise to him would have been to answer for the default of the debtor. But, it being necessary for *W. Cook*, since deceased, to find sureties, the defendant applied to the plaintiff to join him in the bond and bill of exchange, and undertook to save him harmless. A promise to indemnify does not, as it appears to me, fall within either the words or the policy of the statute of frauds." This was in 1828. In 1839, *Green v. Cresswell*, 10 Adol. & E. 453, was decided by the same court, which may be taken to have overruled *Thomas v. Cook*, at least the reasoning of that case was severely criticised. The case was this: The plaintiff, at the request of defendant and under his promise to indemnify and save him harmless, became surety for one Hadley upon a bail bond in a civil action. The defendant did not join as cosurety. The undertaking was held to be within the statute. The court distinguishes *Thomas v. Cook*, by reason of the fact that both the plaintiff and defendant therein joined as cosureties. Subsequent authorities have assigned as a reason for the distinction that, where the defendant is cosurety, he is, as such, and without any special promise, liable already to contribute, and that his special promise to pay the whole may be regarded as but a matter of regulation of contribution between the two sureties. In *Browne on Statute of Frauds* (4th ed.), § 161*a*, it is argued that

the reason is not well assigned because,—First, that, though called ‘regulation’ or ‘contribution,’ it is really a promise to pay what he was not otherwise liable to pay for a third party; and, secondly, that he was never liable to contribute at all except by force of the relation of cosuretyship into which he entered, and owed no antecedent debt of his own.” These cases gave rise to the subsequent divergence of opinion on the subject treated therein, and the decisions of courts of different jurisdictions are to be largely distinguished in that they have followed the one or the other of these early authorities. *Reader v. Kingham*, 13 C. B. (N. S.) 344, a later English case, decided in 1862, and arising out of a similar state of facts, although not overruling is in direct conflict with *Green v. Cresswell*. In *Cripps v. Hartnoll*, 4 Best & S. (Q. B.) 414, the court would not say that it could lend its support to *Green v. Cresswell*. But in a much later case, decided in 1874, *Wildes v. Dudlow*, L. R. 19 Eq. 198, *Green v. Cresswell* was expressly overruled, and *Thomas v. Cook*, approved and followed. In that case the son, at the request of his father, became surety for a third party, the father not signing as a cosurety; and it was held to be an original contract for indemnity, and not within the statute of frauds. By a very recent case (*Guild v. Conrad*, 63 Q. B. Div. 721, decided in 1894), it was held that *Green v. Cresswell*, was no longer binding, but that *Thomas v. Cook*, was good law. So that it may be said that in England the doctrines has been finally settled in harmony with the latter case.

The authorities among the states of this country

are much divided upon the subject. Among the earlier cases to be found is *Chapin v. Merrill*, 4 Wend. 657, decided in 1830. The facts stated are that plaintiff, at the request and upon the solicitation of the defendant, and under a promise of indemnity, entered into an undertaking under seal with one Asa Ransom, by which they covenanted with a mercantile firm that if they would supply one Asa Ransom, Jr., with goods, they, the cosureties, would pay such an amount unpaid by Ransom, Jr., not exceeding \$2,000, as should be due the firm. The defendant had no interest in the goods. MARCY, J., in deciding the case, says: "The contract on which this action is brought is not, in my opinion, within the statute of frauds. The action is brought on the parol undertaking of the defendant to save the plaintiff harmless. * * * The promise in this case was original, and not a collateral undertaking; but had it a sufficient consideration? It is not disclosed that the defendant received any benefit from what was done by the plaintiff, nor is it necessary, as I conceive, that he should to make him liable. In *Tomlinson v. Gill*, 1 Amb. 330, and *Read v. Nash*, 1 Wils. 305, it does not appear that the defendant did or could derive any benefit from their undertakings, yet they were held liable on them. The consideration was the harm to the plaintiffs. In this case the consideration was the assumption of the plaintiff of a responsibility on which he was obliged to pay about \$600. This is an abundant consideration for the undertaking on which this action is brought." This case was subsequently overruled by the Supreme Court of New York (*Kingsley v. Balcome*, 4 Barb. 131). which latter was a case wherein

plaintiff became bail upon arrest at the request of defendant, who promised to indemnify and save him harmless. The opinion is based to some extent upon the express authority of *Green v. Cresswell*. In a later case (*Barry v. Ransom*, 12 N. Y. 462), decided in 1855, it was held that a surety who became such upon a tax collector's bond at the request of his cosurety, and under promise of indemnity could not be required to contribute, the cosurety having paid the whole loss. DENIO, J., says: "The cases where the person making the promise was himself bound for the default of the third person are uniform in holding the contract to be unaffected by the statute." Thus distinguishing *Green v. Cresswell* and *Kingsley v. Balcome*, and following *Thomas v. Cook*, the court concludes: "I am of opinion that where a person is about to become bound by writing to answer for the default of a third party, and he procures another to be bound with him in the same obligation, by promising to indemnify him, this is an original promise, and not within this branch of the statute of frauds." The same result was reached in a Massachusetts case (*Blake v. Cole*, 22 Pick. 97) based upon a similar state of facts. In a later case from the same state (*Aldrich v. Ames*, 9 Gray 77) in which the facts are not stated, except that the promise was made for a valuable consideration, SHAW, J., says: "The theory of the statute of frauds is this: That when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such case is to the creditor not to the debtor. For

instance, if A, a debtor, owes a debt to B, and C promises B, the creditor, to pay it, that is a promise to the creditor to pay the debt of A. But in the same case should C, on good consideration, promise A, the debtor, to pay the debt of B and indemnify A from the payment, although one of the results is to pay the debt of B, yet it is not a promise to the creditor to pay the debt of another, but a promise to the debtor to pay his debt. This rule appears to us to be well settled as the true construction of the statute." These earlier cases are sufficient to illustrate the distinguishing features between the prevailing antagonistic opinions in this country.

The leading and perhaps the best considered cases to be found which follow in the wake of *Green v. Cresswell* and *Kingsley v. Balcome*, are *Easter v. White*, 12 Ohio St. 219; *Bissig v. Britton*, 59 Mo. 204 (21 Am. Rep. 379); *Macey v. Childress*, 2 Tenn. Ch. 438, and *Nugent v. Wolfe*, 111 Pa. St. 471 (56 Am. Rep. 291). The Ohio case was decided long prior to the English case of *Wildes v. Dudlow*, while the Missouri case was almost concurrent in time with it, but without knowledge of its announcement and was not in any manner controlled by it. The other two cases cite it with disapproval. The clearest illustration of the principle maintained by these cases is to be found in *Nugent v. Wolfe*. The First National Bank of Ravenna, Ohio, had obtained judgment against Powers and Company. Nugent went security for Powers and Company, as he alleges, at the request of Wolfe, accompanied with a verbal undertaking or agreement to save Nugent harmless in his undertaking for Powers and Company

with the bank. The court in deciding the case, says: "There is no testimony, nor was any offered, to show that defendant had any personal interest in the judgment on which bail was entered, or that he held property or funds that should have been applied to the payment thereof. So far as appears, it was the proper debt of Powers and Company, and the substance of defendant's agreement is that he would see that they paid it; and, if they failed to do so, he would pay it for them. It was literally a promise to answer for the default of Powers and Company. Plaintiff's liability as bail for stay was merely collateral to the debt in judgment, and had in contemplation nothing but the payment thereof to the bank."

The cases which are usually classed as following *Thomas v. Cook* and *Chapin v. Merrill* may be subdivided into three classes, in consideration of the grounds upon which each is apparently sustained. *First*—It is held that where the inducement for the promise of indemnity is a benefit to the promisor which he did not before or would not otherwise enjoy, as where he has a personal, immediate, and pecuniary interest in the principal transaction, and is therefore himself a party to be benefited by performance on the part of the promisee, the contract is not within the statute and may be supported by a verbal undertaking. In reality the undertaking is to pay a debt which is, in substance, the debt of the promisor: *Smith v. Delaney*, 64 Conn. 264 (42 Am. St. Rep. 181, 20 Atl. 496); *Davis v. Patrick*, 141 U. S. 479 (12 Sup. Ct. 58); *Reed v. Holcomb*, 31 Conn. 360; *Potter v. Brown*, 35 Mich. 274; *Hilliard v. White* (Tex. Civ. App.), 31

S. W. 553; *Emerson v. Slater*, 63 U. S. (22 How.), 43. The doctrine established by these authorities does not seem to be at variance with *Green v. Cresswell* and *Kingsley v. Balcome*. See *Waterman v. Resseter*, 45 Ill. App. 155-165. It cannot be true, as has been intimated, that a new and independent consideration, moving from the promisor to the promisee, will support a verbal promise, for this does not meet the statute, as the writing or memorandum which the statute requires must itself be supported by a consideration. See *Mallory v. Gillett*, 21 N. Y. 412. Second—The promise of indemnity is not a contract with the creditor to answer for the default or miscarriage of the debtor, but is independent of the principal contract or obligation, and constitutes an entirely distinct and separate undertaking, with which the creditor has nothing to do, and which cannot avail him or redound to his benefit in any manner. In such a case the assumption of the liability by plaintiff is itself a sufficient consideration to support the promise, regardless of any subservient interest of the promisor, or of the fact of his becoming cosurety with the promisee, and it need not be in writing: *Mills v. Brown*, 11 Iowa, 314; *Dunn v. West*, 5 B. Mon. 376; *Lucas v. Chamberlain*, 8 B. Mon. 276; *Holmes v. Knight*, 10 N. H. 175; *Jones v. Bacon*, 72 Hun, 506 (25 N. Y. Supp. 212), same case on appeal, 145 N. Y. 446 (4 N. E. 216); *George v. Hoskins* (Ky.), 30 S. W. 406; *Shook v. Vanmater*, 22 Wis. 532; *Vogel v. Melms*, 31 Wis. 306 (11 Am. Rep. 608); *Boyer v. Soules*, 105 Mich. 31 (62 N. W. 1000); *Minick v. Huff*, 41 Neb. 516 (59 N. W. 795); *Tighe v. Morrison*, 116 N. Y. 270 (5 L. R. A. 617, 22 N.

E. 164); *Wildes v. Dudlow*, and *Chapin v. Merrill*, 4 Wend. 657. *Third*—Where the promisee, under the promisor's agreement to indemnify and save harmless, becomes jointly liable as cosurety with him for the same obligor, such an agreement is held to be an original undertaking, and not within the statute. As sustaining this proposition, *Thomas v. Cook*, 8 B. and C. 727, is directly in point. See also *Horn v. Bray*, 51 Ind. 555 (19 Am. Rep. 742); *Apgar's Administrators v. Hiler*, 24 N. J. Law, 812; *Chapeze v. Young*, 87 Ky. 476 (9 S. W. 399); *Adams v. Flanagan*, 36 Vt. 400; *Baldwin v. Fleming*, 90 Ind. 177; *Houck v. Graham*, 123 Ind. 277 (24 N. E. 113); *Barry v. Ransom*, 12 N. Y. 462; *Jones v. Letcher*, 13 B. Mon. 363; *Oldham v. Broom*, 28 Ohio St. 41 (43 Am. Rep. 419); Brandt on Suretyship and Guaranty, § 226; *Mickley v. Stocksleger*, 10 Pa. Co. Ct. R. 345; *Blake v. Cole*, 22 Pick. 97.

It is within this latter class that the case at bar must be grouped. The authorities have not concurred entirely in the reasoning which is supposed to support the doctrine upon which these cases proceed. Chancellor COOPER in *Macey v. Childress*, 2 Tenn. Ch. 438, says they "may be safely rested on the well established doctrine that a surety may by parol limit the extent of his liability as between him and the other parties to the paper." *Mickley v. Stocksleger*, 10 Pa. Co. Ct. Rep. 345, distinguishes *Nugent v. Wolfe*, 111 Pa. St. 471 (56 Am. Rep. 291), in that the latter case "was in no way connected with the original cause of action; he was not a party liable, and it did not appear that he had any personal interest in the judgment on which the plaintiff was the only bail for the stay of

execution." Mr. Browne ventures a reason for which he declares that none other exists so satisfactory or consistent with the spirit of the statute. The reason is alike applicable to the second and third classes above enumerated. The troublesome element in the cases is that by the hypothesis there are or are to be two different persons concurrently liable to the plaintiff to do the same duty. He says: "The implied obligation of the third party exists only by force of and incidental to the special contract between the plaintiff and defendant," and "that the statute contemplates only obligations of the third party previously existing, or incurred contemporaneously with the defendant's special promise, or afterwards as the case may be, but always existing or to exist independently of any contract of guaranty between the plaintiff and defendant; an obligation which exists or may exist, whether any contract be made with the plaintiff and defendant or not; not an obligation which exists only as a legal incident of the contract which they have made." But, seek where you will for a plausible footing upon which to found the obligation so as not to come within the purview of the statute of frauds, the distinction taken in *Green v. Cresswell* or *Thomas v. Cook*, that the promisee became likewise bound upon the obligation with the promisor, as cosureties, and for this reason, if not also for the reason upon which the second class is supported,—that it is not an undertaking with the creditor,—the indemnity is not within the statute, whether adequate or not, has taken deep hold in the judicial mind, and the undoubted weight of authority in this country is grounded upon it. In-

deed, the doctrine is even regarded as settled. Mr. Throop, in his treatise on the Validity of Verbal Agreements, § 474, says: "As the result of the conflict of authority upon this question (speaking generally of contracts of indemnity against a surety's liability) nothing can be regarded as definitely settled, except, perhaps, that, where the promisor and the promisee are about to unite in an instrument as sureties for the third person, the promise to indemnify is not within the statute." If one cosurety can by a verbal undertaking indemnify another in whole against the obligation of the latter, without suffering the interdiction of the statute, he may also in part, as the greater includes the less; and thus it is that cosureties may by contract, agreement, or understanding between themselves, limit and fix the proportion and extent of their several or correlative liability, and it is competent to establish the agreement by parol. So we conclude that it was competent for the plaintiff and defendant to enter into such a contract or agreement as is set forth in plaintiff's complaint, and the fact that it is not in writing cannot be taken as an objection against its enforcement.

Now as to the question whether, in view of the evidence, the court erred in taking the case from the jury and sustaining the motion for nonsuit. Without intimating any opinion as to the weight and effect to be given to the testimony, that being a matter for the jury to determine, and without recapitulation here, let it suffice to say that we deem the evidence introduced competent and sufficient to go to the jury for their consideration whether or not there was such an agree-

ment entered into between the parties touching their correlative liabilities as plaintiff has alleged by his complaint: *Tippin v. Ward*, 5 Or. 453; *Brown v. Oregon Lumber Company*, 24 Or. 317 (33 Pac. 557); *Vanbebber v. Plunkett*, 26 Or. 562 (27 L. R. A. 811, 38 Pac. 708); *Baldwin v. Fleming*, 90 Ind. 177. Let an order be entered remanding the case for a new trial.

REVERSED.

[Decided September 23, 1897.]

FRANKL v. BAILEY.

(50 Pac. 186.)

31	285
81	319
31	285
46	532

1. COUNTY COURTS.—POWER TO RECALL WARRANTS.—Warrants issued by a county court, acting as fiscal agent of the county, in compromise of claims against the county for services rendered, are not judicial decisions upon the validity of the claims: *Crossen v. Wasco County*, 10 Or. 111, followed; hence the county treasurer is bound by a subsequent order issued by such court prohibiting their payment.
2. CHARACTER OF COUNTY WARRANTS.—A warrant issued by a county court, while acting as fiscal agent for the county, is only *prima facie* evidence that the municipality is indebted to the holder thereof; it is not conclusive, but is everywhere open to all defenses available as between the original parties: *Goldsmith v. Baker City*, 31 Or. 249, approved.
3. RIGHT OF COUNTY TO RECOVER ILLEGAL FEES.—Where accounts or claims against a county have been allowed without authority of law, the county court may properly direct the treasurer not to pay them; and if they have been paid, the county may recover the amount: *Union County v. Hyde*, 26 Or. 24, approved.

From Lake: W. C. HALE, Judge.

Mandamus by Adolph Frankl against Harry Bailey, county treasurer, to compel the payment of warrants. From judgment for defendant, plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. C. A. Cogswell, W. A. Wilshire, and E. D. Sperry.*

For respondent there was a brief and an oral argument by *Messrs. L. F. Conn and Austin S. Hammond.*

MR. JUSTICE WOLVERTON delivered the opinion of the court.

This is a proceeding by mandamus against the treasurer of Lake County, Oregon, to compel him to pay three certain county warrants issued by the clerk upon the order of the county court. The alternative writ contains a separate count upon each warrant, identical in form, but involving claims for different amounts, the first of which is, in substance, as follows: That on July 7, 1896, the defendant was, ever since has been, and now is, the treasurer of Lake County; that on June 27, 1890, W. T. Boyd presented to the county court for said county, then sitting as a board of commissioners for the transaction of county business, a claim for services rendered the county, amounting to \$1,150, and that there arose between said court and Boyd a dispute and controversy touching the amount justly due thereon; that, in order to settle the contention, and to prevent litigation, a compromise was effected, whereby it was agreed that the county court should audit and allow, and the said Boyd should accept and receive, \$800 in full settlement and satisfaction of the claim; that the said county court thereupon approved it, and ordered and directed that a warrant be drawn upon the county treasurer in

favor of Boyd for the latter amount, which was done accordingly, and on June 30, 1890, the treasurer duly indorsed the same not paid for want of funds; "that on March 4, 1891, at a different and subsequent term of the said court than the one in which the said warrant was ordered to be issued, and after the same was issued and delivered to the said W. T. Boyd, the County Court of Lake County, Oregon, without any notice to the said W. T. Boyd, or his assignee of said warrant, made and entered an order upon the records of the court, and served a copy thereof upon the treasurer of said county, directing the said treasurer to decline and refuse payment of said warrant." The remaining allegations are touching plaintiff's ownership of the warrant, its due presentation to the treasurer for payment, of funds in his hands applicable thereto, and of his refusal to pay the same, and are not pertinent to the present inquiry. A demurrer was interposed, which was sustained by the court below, and a judgment entered against the plaintiff, dismissing the writ, and for the costs of the proceeding, from which judgment the plaintiff appeals.

1. The defendant insists that the plaintiff, by his allegation touching the order of the county court directing the defendant to refuse payment of the warrant, has shown that he is not entitled to the relief demanded, and that the order itself affords a legitimate excuse for his refusal to apply the funds of the county in payment of such warrant; and this constitutes the chief question presented at the hearing. It has been judicially determined in this state that a county court, when exercising the authority and pow-

ers pertaining to county commissioners in the transaction of county business, within the purview of section 902, Hill's Ann. Laws, is a court of inferior or limited jurisdiction, and that decisions given or rendered by it pertaining to such business are judicial in their nature and character, and can be reviewed only as in said section provided; but that, when acting as the fiscal agent of the county in the general care and management of the county property, funds, and business, under subdivision 9 of section 896, it does not act in the capacity of a court, in the proper sense, but precisely as would the agent of a private corporation in the management of its fiscal concerns: *Crossen v. Wasco County*, 10 Or. 111. From the allegations of the alternative writ it may be fairly inferred that the court, in effecting the alleged compromise, was acting in the capacity of fiscal agent of the county, and not in the transaction of county business, within the purview of section 902, and this is the view evidently taken by counsel for appellant. They say in their brief that, "in making the compromise, the county court acted as the fiscal agent of the county, and had the same authority to do so as would the agent of a private corporation." There is a direct averment, however, that the court was "then sitting and acting as a board of commissioners for the transaction of county business"; but this must be construed in connection with the nature of the business actually considered, which involved a contention respecting back fees and ex-clerk's fees. We presume that the claim in question was made for fees against the county under some statute which it was

contended gave them to the claimant for services rendered; at least, this is the most natural inference deducible from all the averments of the writ. Such being the case, the order of the county commissioners settling the claim was not judicial in its nature, under the authority of *Crossen v. Wasco County*, 10 Or. 111, but such a settlement of a controverted claim as an agent might make in the name of his principal. In further consummation of the alleged settlement, the court directed the county clerk to draw a warrant upon the treasurer for the amount found due in favor of the claimant, which direction was complied with by the clerk, and the warrant was delivered to the claimant. At a subsequent session of the board, and without notice to the claimant or the holder of the warrant, it made and entered an order directing the treasurer not to pay such warrant. Now, if the order thus made and entered justifies the treasurer's refusal to pay the warrant, then the writ does not state a cause upon which to base the proceeding by mandamus, and the demurrer ought to be sustained. True, it may be that the petition is sufficient without the allegation as to the order, which might have been properly treated as matter of defense; but, if the plaintiff chooses to present not only his own case, but to anticipate the defense, and set it up in his complaint, for the purposes of the demurrer the showing must be taken as true, and the cause of action would be affected in like manner as though an answer setting up the matter had been filed and taken as confessed. The question stands thus: If it be admitted

that all the facts stated are true, has the plaintiff a cause of action against the defendant?

The county court is charged, under the statute, with "the general care and management of county property, funds, and business where the law does not otherwise expressly provide": Hill's Ann. Laws, subdivision 9, § 896. By section 2460, *Id.*, it is provided that "the county treasurer shall receive all moneys due and accruing to his county, and disburse the same on the proper orders issued and attested by the county clerk." The warrant in question was directed to be issued by the county court, and the legitimate basis for such warrant was the order of the court settling and allowing plaintiff's demand against the county. As we have seen, the alternative writ shows that the court was acting merely as the fiscal agent of the county in making the settlement and entering the said order. Such being the case, the order cannot be said to rise to the dignity of an adjudication as between the claimant and the county. While the orders of the court acting in such a capacity may have the force and effect of accounts stated as against the county, and absolutely—perhaps irrevocably—fix its liability, when acting within its jurisdiction and prescribed powers, and not vitiated by fraud or mistake (*Cook County v. Ryan*, 51 Ill. App. 190; *Hall v. Inhabitants of Holden*, 116 Mass. 172), yet, they not having the binding effects of judgments (*Nelson v. Mayor, etc.* 131 N. Y. 4, 29 N. E. 814), the court could, if it saw fit, as an individual might, refuse to observe the obligations thereby imposed; in which case the only

remedy left would be an action against the county to require their due observance.

2. It has been held in a late case that warrants such as here exhibited are but evidence of indebtedness, and constitute no final adjudication, as against the municipality, of the claims which they represent. They afford *prima facie* evidence that the municipality is legally indebted to the holder thereof, but do not conclude it on that point, and that, in effect, they are nothing more than nonnegotiable promissory notes, open to all defenses in the hands of the holders available as between the original parties, but that they may be made the basis of an action against the county. See *Goldsmith v. Baker City*, 31 Or. 249 (49 Pac. 973). Now the county court, having charge of the county funds, has directed the county treasurer not to pay this alleged obligation of the county, which is an indirect way of disavowing the county's liability; and, as the warrant is not based upon an order having the binding effect of a judgment against the county, we can see no reason why the treasurer is not precluded by the prohibitory order from using the county funds in discharge of the warrant. It is the duty of the treasurer to disburse the funds upon "the proper orders, issued and attested by the county clerk," but here is a warrant which the court has determined—and we must presume for some legitimate reason—should not be paid, and therefore not proper to be honored by the treasurer.

3. The reason for this action has not been disclosed, but, for aught we know, the county may have some legitimate defense, and, if so, it ought not to be

put to its action to recover back the amount of the claim, which it might do if settled and allowed without authority of law: *Union County v. Hyde*, 26 Or. 24 (37 Pac. 76).

AFFIRMED.

[Argued November 30, 1896; decided May 1, 1897.]

COLUMBIA COUNTY v. MASSIE.

(48 Pac. 694.)

31	292
37	3
31	292
146	278

1. **LIABILITY OF SURETIES ON OFFICIAL BONDS—GENERAL AND SPECIAL BONDS.**—Where additional duties are imposed on a public officer, and he is required to give a bond particularly conditioned for their faithful performance, the sureties on his general bond are not liable for any delinquency in the performance of such new obligation. Within this rule the sureties on a sheriff's general bond, given under section 2392 of Hill's Ann. Laws, for the faithful performance of his duties, and the payment of all moneys coming to him by virtue of his office, are not liable for his failure to account for moneys received by him as tax collector; an additional bond covering his duties as such collector being required by section 2794 of said Laws.
2. **IDEM.**—Under the laws of Oregon in force in the year 1895 the general bonds of sheriffs and the special bonds required of them as tax collectors were not cumulative, but were independent bonds intended to secure the faithful performance of separate and distinct duties; from which it follows that the sureties on one of such bonds were not liable for any defalcation in the performance of the duties for which the other bond was given.

From Multnomah: E. D. SHATTUCK, Judge.

Action at law by Columbia County against G. A. Massie and others to recover a certain sum collected by Massie as taxes, and taken with him when he fled from the country as a defaulter. There was a judgment on the pleadings in favor of defendants, hence this appeal.

AFFIRMED.

For appellant there was a brief over the names of *Julius C. Moreland* and *W. N. Barrett*, district attorney, with an oral argument by *Mr. Moreland*.

For respondents there was a brief over the names of *Dillard & Cole*, with an oral argument by *Mr. W. B. Dillard*.

Opinion by MR. JUSTICE BEAN.

1. This is an action against G. A. Massie, late sheriff of Columbia County, and the sureties on his official undertaking, to recover the sum of \$3,500 on account of taxes collected by him and not accounted for according to law. Massie was elected sheriff in June, 1892, and qualified by giving an official undertaking in the sum of \$10,000, as required by section 2392 of the Code, with the other defendants as sureties, but failed and neglected to give the additional bond required by section 2794 before entering upon his duties as tax collector, and the single question on this appeal is whether the sureties on his official undertaking are liable for his default in the matter of the collection of taxes. By the provisions of sections 2390 and 2392, Hill's Ann. Laws, the sheriff is required, before entering upon the discharge of his duties as such, to give and file an undertaking in the sum of \$10,000, with two or more sureties, residents of the county, and having the qualification of bail on arrest, conditioned that if he "shall not faithfully pay over, according to law, all moneys that may come to his hands by virtue of such office, and otherwise well and faithfully perform the duties" thereof, his sureties or either of them will

pay to the State of Oregon the sum of \$10,000. By sections 2793 and 2794 the sheriff is made the tax collector of his county, and it is provided that "before entering upon the collection of taxes" he "shall execute an additional bond in such sum as the county court may direct." It thus appears that the sheriff is required, before entering upon the general duties of his office, to give and file an official undertaking with sureties for the faithful performance thereof, and for the payment according to law of all moneys which may come into his hands, and this would probably cover his duties as tax collector, if the legislature in imposing that duty had not required him to execute an additional bond before entering upon its performance. In view of this latter provision of the law, it seems to us very plain that the legislature was not willing to rely upon the general bond of a sheriff for the performance of his special duty as tax collector, but required the execution of an additional bond for that purpose; and, this being so, the sureties on his official bond are manifestly not liable for a default in the discharge of the special duty.

The general rule is unquestioned that where a special duty is imposed upon a public officer, and he is required to give an additional bond for its faithful performance, the sureties on his general bond are not liable for any delinquency in the performance of such special duty: Murfree on Sheriffs, § 51; 24 Am. & Eng. Enc. Law (1st ed.), 874. Thus, by the law of Kentucky the sheriff was made the collector of certain railroad taxes, and required to give a special bond as security for the performance of that duty, and it was

held that he had no right to collect the taxes until he had executed the required bond, and therefore the sureties on his general official bond were not liable for his default in the matter of the collection of such taxes: *Anderson v. Thompson*, 10 Bush. 132. So, also, in *Commonwealth v. Toms*, 45 Pa. St. 408, it was held that the sureties on a bond given by a register for the faithful execution of his duties, and the payment of all moneys received for the use of the commonwealth to the proper custodian thereof, were not responsible for collateral inheritance taxes collected but not paid over by him, since the law under which they were collected required a special bond to cover that duty. And again in *County Board of Education v. Bateman*, 102 N. C. 52 (11 Am. St. Rep. 708, 8 S. E. 862), it was ruled that the bond of a county treasurer, conditioned that "he shall well and truly account for all moneys that may come to his hands by virtue of his office, and shall faithfully perform all things pertaining to his office," etc., did not cover the duties imposed by a law requiring him to receive and disburse all public school funds, and to execute a bond as surety for the performance of such duty. In addition to these adjudications, the following decisions and authorities therein cited may also be referred to as bearing upon this discussion, and fully supporting the doctrine announced: *Board of Supervisors v. Ehlers*, 45 Wis. 281; *Costley v. Allen*, 56 Ala. 198.

2. Counsel for the plaintiff contends, however, that the official bond of a sheriff and his special bond as tax collector are, under the statutes of this state, cumulative, and that the sureties on both bonds are

liable for the faithful performance of the duties imposed upon that officer by law, whether they are strictly as sheriff or as tax collector; but this can hardly be regarded as the most reasonable construction of the statutes. While the legislature may constitutionally impose upon a sheriff the duty of collecting the public revenues (*Lane v. Coos County*, 10 Or. 223), it is certainly no part of the general duties of that officer. The duties of a sheriff, as such, are more or less directly connected with the administration of justice, and have no relation whatever to the collection of the public revenues. They relate to the execution of the orders, judgments, and processes of the courts, the arrest and detention of persons charged with crime, the preservation of the public peace, the service of papers, and the like; and, therefore, when the legislature required the giving and filing of an undertaking before entering upon the performance of the duties of sheriff, and another before entering upon the performance of the special duty of collecting the public taxes, it is but reasonable to assume that it had this distinction in mind, and intended the official bond to cover the duties of the sheriff as such, and the other and additional bond as security for the performance of the special duty imposed upon him by the law requiring him to collect the public revenues, and that the sureties on one bond should not be liable for any defalcation in the performance of the duties for which the other was given. These principles lead to an affirmance of the judgment, and it is so ordered.

AFFIRMED.

[Decided December 7, 1897; rehearing denied.]

RE PARTRIDGE'S ESTATE.

(51 Pac. 82.)

31	297
36	292

ACCOUNTING BY ADMINISTRATORS—SPECIAL COMPENSATION.*—In presenting a claim for extra compensation an administrator should particularly state the services on which it is based with such explanations as will enable interested persons to fairly understand the situation: *Steel v. Holladay*, 20 Or. 462, cited and applied.

DISCRETION OF COUNTY COURT—EXTRA COMPENSATION OF ADMINISTRATORS.†—County courts must exercise a wide discretion in determining the reasonableness of claims for extra services to estates, and in the present case the allowance will not be disturbed.

REMOVAL OF ADMINISTRATOR.—Under the provisions of sections 1094 and 1100, Hill's Ann. Laws, an administrator should be cited to appear, and ought to have an opportunity to be heard, on the question of his removal, yet these requirements are sufficiently complied with where there is a hearing on the officer's reports, and if good cause appears in these proceedings the court may remove him without a special hearing on that particular matter.

From Multnomah: E. D. SHATTUCK, Judge.

Judicial settlement of the accounts of G. M. Weister, administrator with the will annexed of the estate of E. J. Partridge, deceased, to which the M. A. Seed Dry-Plate Company filed objections. E. J. Partridge, who was a resident of Portland, and engaged in the wholesale photographic supply business, died testate, on the — day of June, 1891. On July 7, G. M. Weister was appointed special administrator of his estate, with power to "continue the business and collect the outstanding bills as speedily as is consistent

*Section 1188, of Hill's Ann. Laws, relating to extra compensation of administrators and executors is as follows: " * * * In all cases such further compensation as is just and reasonable may be allowed by the court or judge thereof for any extraordinary and unusual services not ordinarily required of an executor or administrator in the discharge of his trust."

†On this subject see *Re McCullough's Estate*, 81 Or. 86.

with the good of the business." Weister qualified, and entered upon the discharge of his duties, and continued to act as special administrator until December 10, 1891, when he was appointed administrator with the will annexed, the executor nominated in the will failing to serve, but no order was entered allowing him to continue the business as before. In the meantime, about September 10, the residuary legatees consented in writing that the administrator should continue the business as it had been prior to the death of decedent. Among other things, the will provides as follows: "I hereby nominate, constitute, and appoint my brother, Samuel C. Partridge, executor of this, my last will and testament; * * * and I further direct that the photograph supply business heretofore conducted by me at Portland be continued or discontinued by my executor, as he shall deem best; *provided, however*, that, in the event that my said executor shall determine to continue the said business, the consent, in writing, of a majority in interest of my residuary legatees above named, shall be necessary; and, if such consent is not obtained, that my said executor shall proceed to wind up said business and realize on the assets thereof." The administrator continued the business after the latter appointment, and on August 3, 1892, he filed what is denominated a "report of summaries of business transacted by him during six months last past," which is as follows:—

Cash on hand at time of appointment	- - \$	623 62
Cash received on old accounts, from June,		
1891, to June 13, 1892	- - - - -	3,498 12

Cash received on sales merchandise to

June 13, 1892, accounts - - - - - 17,081 04

Cash received on daily sales merchandise

to June 13, 1892, accounts - - - - - 4,651 91

\$25,854 69

Paid on claims and for expenses and new

merchandise - - - - - 25,800 58

Balance cash on hand - - - - - \$ 54 11

On November 1 he filed the following account, in pursuance of the order of the court made at the instance of the M. A. Seed Dry-Plate Company, which also required him to show cause why said estate should not be wound up and settled:—

ASSETS OF ESTATE.

Stock, goods, wares, and merchandise - - \$ 9,224 83

Accounts on books owing the estate - - 9,084 59

\$18,309 42

LIABILITIES.

Claims allowed, reported November 1, 1892 \$ 7,928 16

Current accounts of the business - - - 2,980 86

\$10,908 92

Claims paid - - - - - 682 50

Leaving a probable balance of - - - - 7,400 50

Claims collected on accounts due estate at

time of inventory - - - - - 3,773 17

These comprise all the reports or accounts made or filed by the administrator touching his management of the estate, except the one now to be noticed. On December 20, 1892, he was ordered to close out

the business and file his final account by April 1, 1893. The date was subsequently postponed to May 1, and then to July 1. On July 18 he filed what he denominated his "final report and account," which purports to show only the "moneys and assets coming into his hands and amounts disbursed since November 1, 1892." Among the items of expenditures are \$728.20 for rent and \$2,199.15 for salaries. The prayer is that the account may be adjusted, and distribution ordered, and that he and his bondsmen may be finally discharged. The day for final hearing and settlement of the account was set for September 5, 1893. Prior to the last named date the M. A. Seed Dry-Plate Company, which was a creditor of said estate in the sum of \$1,284.55, filed objections to said account, and more especially to the item of \$2,199.15, salaries from November 1, 1892, to the date of filing the final account, and set up some facts tending to show negligence and misconduct of the administrator and maladministration of the estate. Upon the hearing, the court disallowed the claim for salaries except \$810, and made an order charging him with the difference between the amount claimed and the amount allowed, together with other moneys admitted to be in his hands, and removed him from his trust, and appointed Miss Alice Gibson administratrix *de bonis non* with the will annexed. An appeal was taken from this order and decree to the circuit court, and there affirmed, and Weister now prosecutes an appeal to this court.

AFFIRMED.

For appellant there was an oral argument by *Mr. Cicero Milton Idleman*, with a brief to this effect:

An administrator cannot be removed except upon direct proceedings for that purpose: Hill's Ann. Laws, §§ 1087, 1094, 1095, 1100, 1173, 1174, 1175; *Ramp v. McDaniel*, 12 Or. 108; *In re Holladay Estate*, 18 Or. 168; *Wright v. Edwards*, 10 Or. 298, 301; *Rostel v. Morat*, 19 Or. 181, 184.

The only issue before the county court upon the trial of this cause was that presented by the objections to the final account of the administrator. These objections are detailed and specific and, with the answer thereto, present clear and definite issues, and upon these issues, and these alone, the evidence was taken and the case tried. The issues thus formed prescribe the limit of investigation, and of necessity, the extent of the decision. Within these limits the court may be conceded the largest latitude of discretion, but surely no court has discretion to grant relief entirely outside the issues and especially to grant a character of relief different from that sought and for which the statute has provided a special mode of procedure.

Proceedings for the removal of an administrator are specially provided for and the method of invoking the jurisdiction of the court for that purpose is particularly pointed out in the statute: Hill's Ann. Laws, §§ 1094, 1095, 1100. The only difference between the two methods pointed out by these sections is that in the former the proceedings are begun by petition which is the basis of the notice, and in the latter the proceedings are instituted upon motion of the judge

based upon certain facts within his knowledge. In both methods of procedure the administrator must have notice that proceedings for his removal have been instituted and that he must appear and defend upon that issue. In this case there was no suggestion either in the objections filed, or in any of the proceedings, that there was to be an effort to remove the administrator. If the court was not satisfied with his management of the estate a citation to show cause why he should not be removed might have been issued to the administrator under section 1100, but the court had no power to summarily remove him because not satisfied with his report. This was beyond the jurisdiction of the court. If the court was not satisfied with the administrator's report and sustained the objections to it the administrator might either appeal from that decision or he might file another report obviating the objections: *Rostel v. Morat*, 19 Or. 181. But inasmuch as the court summarily removed the administrator he had no opportunity to file any additional report or to make any further showing.

For respondent, the M. A. Seed Dry-Plate Company, there was an oral argument by *Mr. J. Couch Flanders*, with a brief over the names of *Williams, Wood & Linthicum*, and *Mr. Flanders*, to this effect:

County courts are, in the nature of things, vested with a very large discretionary power over the conduct of executors and administrators, and its exercise will not be interfered with on appeal, unless plainly required by some principle of law: *In re Holladay's Estate*, 18 Or. 168.

When, in the hearing of objections to the account of an administrator, a showing is made of maladministration by an administrator, the probate court has inherent power to remove such administrator, although no direct proceeding for such removal had been instituted: *Succession of Glover* (La.), 9 So. Rep. 97.

The amount of extra compensation to be allowed an administrator, over and above the statutory compensation, is discretionary with the probate and circuit courts, and such discretion will not be interfered with on appeal: *Steel v. Holladay*, 20 Or. 462, 465; *Mower's Appeal*, 48 Mich. 441, 452; *Wilson v. Wilson*, 3 Gill & J. 15; *West v. Smith*, 8 How. 411; *Handy v. Collins*, 60 Md. 230 (45 Am. Rep. 725).

No allowance should be made to an executor for unusual or extraordinary services, unless an account is presented setting forth the same: *Steel v. Holladay*, 20 Or. 462, 465; *In re Moore's Estate* (Cal.), 31 Pac. 584, 585; *Collins v. Tilton*, 58 Ind. 374.

An administrator may forfeit right to compensation by misconduct in office: *Crosswell on Executors*, § 546.

PER CURIAM. Error is predicated of the action of the county court in two particulars: First, in the disallowance in part of Weister's claim for salaries from November 1, 1892, to the date of filing his final account; and, second, in removing him as administrator, because the proceeding was not one instituted under the statute for the especial purpose, nor by citation to the administrator to show cause against such action.

It is shown by the evidence in the case that a con-

cern styled the "Weister-Meek Company" was formed about January 1, 1893, to engage in the same line of business as that carried on by the Partridge estate, under the administration of Weister. Miss Alice Gibson, the bookkeeper of the Partridge estate as well as for the Weister-Meek Company, says it actually commenced business January 1, 1893, but had no stock until some time in February; and Weister admits that it began in February or some time before. There is but little doubt that Weister was a member of the concern, but he claims that he was only nominally so, and that his name was used by Meek without his consent. It is certain, however, that he was its sole manager from its inception until the remaining goods of the estate were sold at auction, June 26, 1893, and that Meek had but little, if anything, to do with it. The business of the company was opened up and carried on in the same building as that occupied by the Partridge estate, and the same help employed in the one as in the other; that is to say, the two concerns occupied the same building, and were managed and conducted by one person and his employees each working upon a single salary. These salaries and the rental for the building thus occupied were all paid out of the funds of the Partridge estate; but, to compensate the estate for services rendered the Weister-Meek Company by said manager and employees, and for the use of the building from the time of its inception, Weister charged the company with \$150, and gave the estate credit for a like amount. The alleged expenses for salaries was \$250 per month, except when a stenographer was employed, in which event it

was more, and the rental was \$85 per month. An attempt was made to show the relative amount of business transacted by each concern, which was estimated to be about 75 per cent. by the estate, and 25 per cent. by the company. After December 20 the administrator was engaged solely in closing out the remnant of stock on hand, and collecting outstanding claims and accounts, by direction of the court, for the purpose of winding up the business and settling the estate. The claim for salaries is stated in the account in a lump sum, but no vouchers were filed therewith nor produced at the trial. Weister claimed a salary for his own services of \$100 per month, but it does not appear to whom, or what amount to each, the balance of the expense for salaries was paid, nor is there anything to show the necessity or reasonableness thereof. In this state of the record, the county court allowed Weister \$810 in addition to his regular statutory commission of \$384.23 upon the appraised value of the estate, as reasonable compensation for extraordinary services as such administrator, and disallowed the balance of his claim.

Ought we to disturb this conclusion? The appellant has not shown himself entitled to more. The statute requires that the final account of an administrator shall contain a detailed statement of the amount of money received and expended by him, from whom received, and to whom paid, and refers to vouchers for such payments: Hill's Ann. Laws, § 1173. As it pertains to the alleged expenses paid on account of salaries, as with other alleged expenses, the account filed fails utterly in a compliance with the statute, nor

does the proof help the administrator except as it pertains to his individual salary. Beyond this feature, it was the duty of the administrator to state with particularity his claim for extra compensation, so that the court, as well as those interested in the estate, may be informed fully of the nature of the service rendered, and of its necessity and value to the estate, and be thereby enabled to distinguish the items which are a proper charge from those that may be unjust and improper: *Steel v. Holladay*, 20 Or. 462 (26 Pac. 562). In *May v. Green*, 75 Ala. 167, it is said that "proof, moreover, should have been made of each special service with its peculiar value, and the whole should not have been aggregated by mere estimate without being itemized." Under these authorities, and in the light of the facts of the case, with the large discretionary power lodged with the county court in determining the amount and reasonableness of charges as extra compensation, we are unable to say that its conclusion is unjust to the administrator; and we are constrained to permit the decree in that respect to stand.

As relating to the second contention, the statute provides that an executor or administrator may be removed, upon application of an heir, legatee, devisee, creditor, or other person interested in the estate, for unfaithfulness or neglect of his trust to the probable loss of the applicant; or the court may, for like cause, upon its own motion, remove such officer; but in either instance he must be cited to appear and show cause why such action should not be taken, and is thereby accorded a hearing in the premises: Hill's

Ann. Laws §§ 1094, 1100. In the case at bar there was no such citation and no hearing had upon the precise question. But the administrator was before the court upon his own application to be discharged. It appeared, however, that the estate had not been fully administered, there being many accounts due the estate which were yet uncollected; and there was much evidence adduced showing maladministration on the part of Weister. He, as administrator of the estate, sold goods to himself, as manager of the Weister-Meek Company; and these he again sold at a profit to the company of more than 100 per cent. During the time the two concerns were engaged in business in the same building, there was sold to the company goods for which it paid the estate \$360, which were again sold by the company to its customers for \$742.67; and when the goods belonging to the estate were finally disposed of at auction, it seems that large quantities of them found their way into the Weister-Meek Company's business, since which time Weister has continued as manager, and received a salary direct from the company. An attempt is made to explain this action of the administrator by testimony that the company sold on credit, while it purchased from the estate for cash, and that, through the agency of the company, the estate was enabled to dispose of a larger amount of its stock, and at a greater profit, than it could otherwise have done; but, considering all, the administrator has not satisfactorily justified his management of the estate. He has had much time within which to have collected and adjusted the outstanding accounts without satisfactory results, and, in

view of his past conduct, it is reasonably inferable that his continuance in office would probably be followed by loss to interested parties. Whether or not the order of removal was proper, as a primary act, we shall not determine; but having been made upon what would appear to be sufficient cause, though not in a proceeding instituted directly for that purpose, with citation to him and an opportunity to be heard upon the precise issue, this court will not now disturb it (*Succession of Glover* [La.] 9 So. 97); and the decree of the court below will therefore be affirmed in so far as it affirms the decree of the county court. The court costs attending the appeal in both instances should be borne by the estate.

AFFIRMED.

[Argued November 29; decided December 27, 1897.]

TILLAMOOK DAIRY ASSOCIATION v. SCHERMERHORN.

(51 Pac. 438.)

PLEADING—AMENDMENT BY OMITTING A PARTY.—The rule in Oregon concerning amendments to complaints by omitting some parties originally sued is that when it appears, in an action upon a joint contract, that one or more of the defendants are not liable, they may be dropped and the cause continued as to the others, the test being whether there could have been a recovery against any of the defendants had they been sued alone. This rule is influenced by section 80, subdivision 3, Hill's Ann. Laws, and sections 244 and 245 concerning separate judgments against different defendants: *Sears v. McGrew*, 10 Or. 48; *Ah Lep v. Gong Choy*, 18 Or. 205, and *Hamm v. Basche*, 22 Or. 513, approved and followed.

IDEM.—It is an appropriate exercise of discretion for a trial court to permit a complaint to be amended before trial by omitting the name of a defendant: *Talbot v. Garretson*, 31 Or. 256, applied.

From Multnomah: E. D. SHATTUCK, Judge.

31	308
33	91

81	308
40	410

31	308
43	79

Action by the Tillamook Dairy Association against Barnet S. and Charles F. Schermerhorn as partners. The defendant Charles F. Schermerhorn filed a separate answer in abatement of the action, and the defendant Barnet S. Schermerhorn demurred. When the demurrer was brought on for hearing, the plaintiff applied for leave to amend its complaint by striking out the name of Charles F. Schermerhorn, which was granted, and the cause dismissed as to him. The plaintiff thereupon filed an amended complaint, setting out the same cause of action, and alleging that the defendant Barnet S. Schermerhorn is doing business under the firm name of Schermerhorn and Company, and demanded judgment accordingly. Upon motion of defendant, the amended complaint was stricken from the files; and the action of the court in this regard is assigned as error, and constitutes the basis of the sole question made upon the appeal.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Wallace W. Thayer*.

For respondent there was a brief and an oral argument by *Mr. A. King Wilson*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

It is contended by the defendant that, the action having been brought against two parties upon an alleged joint contract, the complaint could not be amended so as to state a cause of action against one

of them only; that such an amendment is, in effect, the statement of a new and different cause of action, which it is thought is not permissible under the practice. The idea formerly obtained that a joint obligation or contract constituted an indivisible demand. The several individuals jointly contracting were considered as a single entity, and, to describe that entity, it was necessary to name the identical individuals bound. A description which omitted any that were bound, or included others not bound, would not identify the entity. Hence it was requisite that all the individuals composing it should be charged, and no more; otherwise, the contract sued on would not be the one made. So, it was considered that an amendment which omitted a party formerly charged jointly with another was a statement of a new and distinct cause of action. Modern code practice, however, has materially encroached upon this idea, and a nonjoinder or misjoinder of parties defendant does not necessarily nonsuit the plaintiff or defeat the action. It is provided by statute that when an action is against two or more defendants, and "all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant, or defendants, if the action had been against them, or either of them alone": Hill's Ann. Laws, § 60, subdivision 3. Furthermore, "judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants"; and, "in an action against several defendants, the court may, in its discretion, render judgment against one or more

of them, whenever a several judgment is proper, leaving the action to proceed against the others": Hill's Ann. Laws, §§ 244, 245. A statute identical in effect with these sections has received judicial construction in New York, and it is there held that "a plaintiff is not now to be nonsuited because he has brought too many parties into court. If he could recover against any of the defendants upon the facts proved had he sued them alone, the recovery against them is proper, although he may have joined others with them in the action against whom no liability is shown": *McIntosh v. Ensign*, 28 N. Y. 169, 172. And under a statute of similar import more recently enacted, and which it was declared should receive the same construction as the former, ANDREWS, J., says: "The common-law rule that, in an action against several defendants upon an alleged joint contract, the plaintiff must fail unless he establishes the joint liability of all the defendants, is no longer the rule of procedure in this state. By the former code (section 274), the court was authorized in an action against several defendants to render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment was proper. The court, in construing this provision, did not limit its application to cases of joint and several liability, but considered it as authorizing a separate judgment where a separate liability of some of the defendants was established on the trial, although the cause of action, as alleged in the complaint, was joint only": *Stedeker v. Bernard*, 102 N. Y. 327, 330 (6 N. E. 791).

From these authorities the true and reasonable

construction of the several sections of our statute al-
luded to would appear to be that when, in an action
upon a joint contract, it is determined that one or
more of the defendants are not liable, but that one or
more of the others are, judgment may be given and
rendered against those liable, whether their liability
be joint or several, and the other defendants may be
dismissed. "The test," says EMOTT, J., in *McIntosh v.*
Ensign, 28 N. Y. 169, "is whether the plaintiff can re-
cover in the action against any of the defendants if
they had been sued alone." This view seems to be
generally supported by judicial opinion: See *Ruten-*
berg v. Main, 47 Cal. 214; *Gruhn v. Stanley*, 92 Cal. 86
(28 Pac. 56); *Lewis v. Clarkin*, 18 Cal. 399; *Lewis v.*
Williams, 3 Minn. 151; *Makepeace v. Davis*, 27 Ind.
352; *Truesdell v. Rhodes*, 26 Wis. 215; Pomeroy's Code
Remedies, §§ 289-292. The decisions of this court are
in exact harmony with the interpretation elsewhere.
See *Sears v. McGrew*, 10 Or. 48; *Ah Lep v. Gong Choy*,
13 Or. 205 (9 Pac. 483); *Hamm v. Basche*, 22 Or. 513
(30 Pac. 501). An effort was made to distinguish
these cases as resting upon contracts not joint, but
either several or joint and several, and for that reason
not in point. But, in the light of the other adjudica-
tions referred to, we regard this as a "distinction with-
out a difference." If A, B and C are sued upon a
joint contract or obligation, and it should turn out
that C was not bound, under the rule judgment could
go against A and B, while the complaint would be dis-
missed as to C, to the same effect as if the action had
been instituted against all upon a several or joint and
several contract, and it was shown that C was not lia-

ble with the others. Nor could it make any difference that several persons were sued as jointly bound, and it should appear that one only was obligated. Judgment could be had as to him, and the complaint dismissed as to the others: *Stedeker v. Bernard*, 102 N. Y. 327 (6 N. E. 791), was an action against several defendants, who, it was alleged, were partners, doing business under the firm name of H. O. Bernard and Company, and which firm had executed and delivered its check to plaintiff. The answer denied that the check was made in behalf of or by the firm, but averred that it was executed by Bernard individually in his private business. The court, on motion of plaintiff for judgment on account of the frivolousness of the answer, gave judgment against Bernard, and allowed the action to be continued against the other defendants. The judgment against Bernard singly was sustained, although the action was instituted upon an alleged joint obligation of several doing business as partners under a designated firm name. Apply the test indicated by EMOTT, J., in *McIntosh v. Ensign*, 28 N. Y. 169, to the case at bar, and we have but to look to the amended complaint, the allegations of which must be taken as true for the purposes of the motion, to determine whether the plaintiff would have been entitled to a judgment against Barnet S. Schermerhorn if the action had been instituted against him singly; and from the averments therein it clearly appears that he would have been so entitled, although he had no cause of action against Charles F. Schermerhorn.

The amendment was before trial, and germane to the subject-matter of the controversy, and one proper

to have been made under the sound discretion of the court: *Talbot v. Garretson*, 31 Or. 256 (49 Pac. 978). The court below, in the exercise of such discretion (Hill's Ann. Laws, § 101), granted leave to amend by striking out the name of Charles F. Schermerhorn, but, upon motion to strike the amended complaint from the files, concluded that the amendment was one that he had not the power to allow, and sustained the motion. In this it was in error, and the judgment will therefore be reversed and remanded for such further action as may be deemed advisable in the premises.

REVERSED.

31 314
146 280
146 532

[Argued November 18; decided December 27, 1897.]

STOUT v. YAMHILL COUNTY.

(51 Pac. 442.)

COUNTY COURT AS FISCAL AGENT.—A county court acting on the expediency and manner of repairing bridges in the public highway is acting as an agent of the county and not as a court: *Crossen v. Wasco County*, 10 Or. 111, and *Frankl v. Bailey*, 31 Or. 285, applied.

RECORDS OF COUNTY COURT—PAROL EVIDENCE.—Parol evidence is admissible to supplement the records of a county court as to proceedings of such court when sitting for the transaction of county business, since the court is then acting only as the agent of the county, and in such cases the records do not constitute the only evidence of what was done.

From Yamhill: GEORGE H. BURNETT, Judge.

This is an action by the firm of Stout & Martin to recover \$1,010.80 for lumber alleged to have been sold and delivered by the plaintiffs to the defendant county. The complaint alleges that on the eighteenth day of June, 1894, the County Court of Yamhill

County, sitting for the transacting of county business, duly designated and appointed one of its members, J. J. Henderson, to superintend the repair of an approach to a bridge on the public highway across the South Yamhill River, between McMinnville and Dayton, or to rebuild the same in such manner as in his judgment would be for the best interests of the county; that, pursuant to this appointment, Henderson, on the nineteenth day of June, 1894, in the name and on behalf of the county, contracted with the plaintiffs for certain lumber to be used in the repair of such approach; that, in pursuance of this contract, the plaintiffs sold to the defendant, and delivered to Henderson for it, between the nineteenth day of June and the seventh day of August, one hundred and thirty-four thousand, seven hundred and forty-four feet of lumber at the agreed price of \$7.50 per thousand, amounting in the aggregate to \$1,010.80; that the lumber was sold and delivered to be used, and was used, in repairing the approach to such bridge, with the knowledge and consent of the defendant, and is now in use by the public; that on August 8, 1894, plaintiffs presented their claim to the county court, and on September 5 following the sum of \$181.11 was allowed thereon, which the plaintiffs refused to accept. The answer admits the making of the order appointing Henderson superintendent of the repairs or rebuilding of the approach referred to, but denies that, in pursuance of such appointment, he made the contract with plaintiffs alleged in the complaint, or that they furnished to the defendant any lumber whatever to be used in repairing such approach, except to the amount

and reasonable value of \$181.11, which amount had been duly allowed by the county court.

Upon the trial the plaintiffs, to sustain the issues on their part, gave in evidence a certified copy of an order of the county court "in the matter of rebuilding or repairing approach to the bridge across South Yamhill River, between McMinnville and Dayton," of date June 18, 1894, appointing Henderson "to superintend the repair of said approach, or rebuild the same in the manner that, in his judgment, will be for the best interests of the county." They then offered to prove by parol that the order as entered by the clerk in the journal did not fully express the authority conferred upon Henderson by the county court, but that it actually authorized and empowered him to employ the labor and purchase the lumber and other material necessary to rebuild or repair such approach, as he might think best; that one of the plaintiffs was in attendance on the county court at the time this order was made for the purpose of contracting with such court to furnish the lumber necessary for the repair of the approach in question, and that he was informed by the members of the court, while it was in session, that Henderson, who was one of the county commissioners, had been appointed the agent of the county, with full power and authority to make all necessary contracts in reference to the matter, and that he should see him concerning the same; that he subsequently contracted with Henderson to furnish the lumber, and did so furnish it, and it was used by him in the repair of the approach to the bridge in question, and entered into and formed a part thereof; that

he subsequently filed with the county court a verified, itemized claim for the lumber so furnished, and that such court allowed thereon the sum of \$181.11; that Henderson thereafter made a verbal report to the county court, while in session, of his doings in the matter of the repair of the approach to the bridge in question, and that such court at the time ratified and confirmed all his acts in relation thereto. But all this evidence was ruled out by the court as incompetent, and upon motion of the defendant a nonsuit was ordered, from which judgments the plaintiffs bring this appeal.

REVERSED.

For appellants there was a brief over the names of *George G. Bingham* and *Spencer & Talmage*, with an oral argument by *Mr. Bingham* and *Mr. S. S. Spencer*.

For respondent there was an oral argument by *Messrs. Samuel L. Hayden*, district attorney, and *W. M. Ramsey*, with a brief over the names of *Ramsey & Fenton*, to this effect:

County courts, when transacting county business, act as courts of record with a clerk, and all their proceedings must be entered of record. They are not mere boards: Consti., Art. VII., §§ 1, 12, 15; Hill's Ann. Laws, §§ 893, 896, 899, 903. County courts when transacting the mere fiscal affairs of the county, as for example, auditing bills, speak only by their records.

When an inferior court has jurisdiction of a matter its proceedings are to be judged the same as those of a superior court: *Dempster v. Purnell*, 3 M. & G. 375; 1 Black on Judgments, § 287.

A county court being a court of record, and the statute requiring its proceedings to be kept of record, can speak only by its journal: *Douglas County Road Company v. Abraham*, 5 Or. 318-323; *Douglas County Road Company v. Douglas County*, 5 Or. 373; *Vaughn v. School District*, 27 Or. 57 (39 Pac. 395); *Moore v. Newfield*, 4 Me. 46; *Judson v. School District*, 38 Me. 170; *People v. Board of Supervisors*, 125 Ill. 334; *Tustin v. Gaunt*, 4 Or. 313.

In support of the proposition that where a court or other public tribunal is required to keep a record of its proceedings and has a clerk, parol proof is not admissible to contradict, aid, or supplement the record, or to show alleged proceedings where the record is silent, we refer to the following: *Berryman v. Granville*, 51 Ala. 507; *Stevenson v. Bay City*, 26 Mich. 44; *Hall v. People, etc.*, 21 Mich. 456; *Louisville v. McKegney*, 7 Bush (Ky.), 651, 652; *Taylor v. Heny*, 2 Pick. 397, 402; *Manning v. Gloucester*, 6 Pick. 6; *Andrews v. Boylston*, 110 Mass. 213; *Morrison v. Lawrence*, 98 Mass. 219; *Mayhew v. District, etc.*, 13 Allen, 129; 20 Am. and Eng. Enc. Law (1st ed.), 501, 503; *State v. Locket*, 54 Mo. App. 202; *Holt v. Moonch*, 5 Tex. Cir. App. 650; *Phelan v. County of San Francisco*, 5 Cal. 541; *Pennsylvania Railroad Company v. Montgomery Passenger Railway Company*, 27 L. R. A. 766; *School District v. Padden*, 89 Pa. St. 395.

MR. JUSTICE BEAN, after stating the facts in the foregoing language, delivered the opinion of the court.

The rulings of the trial court were evidently based upon the theory that Henderson's authority to make

the contract upon which this action is based could be proven only by the records of the county court, and that parol evidence was not admissible to supplement such record as to facts which actually occurred, but of which the clerk neglected to make a proper record. In this we think the court was in error. A county court, when exercising the authority and powers pertaining to county commissioners under section 896 of Hill's Ann. Laws, acts either as a court of inferior jurisdiction, or as the mere fiscal or managing agent of the county, according to the nature and character of the matter under consideration: *Crossen v. Wasco County*, 10 Or. 111; *Frankl v. Bailey*, 31 Or. 285 (50 Pac. 186). Its judicial proceedings must, like that of all courts, be proven by the record; but when it is acting as a mere managing agent in the transaction of the ordinary business of the county there is no law, statutory or otherwise, rendering invalid a contract made with or by its authority merely because such contract, or the authority of the person making it, is not entered in the records of the court, and there is no statute making the record the only evidence thereof. It is not the record, but the assent and agreement of the members of the court when in session, and acting as a court, which gives validity to the contract; and the negligence of the clerk in failing to fully record their proceedings cannot nullify their acts. If the clerk makes a complete record, as the statute seems to contemplate he shall do (section 903), such record is competent, and the best evidence of its acts, and perhaps cannot be contradicted by parol; but, if he fails to perform this duty, it is no defense

to an action against the county upon the contract as actually made. The reason is apparent. A party contracting with a county court has no power or authority to determine what shall or shall not be entered in the records. That is a matter which rests alone with the county officers, and the law will not permit prejudice or loss to such a party by reason of the negligence or intentional omission of the other contracting party to make the records of the court show all its acts and proceedings, but allows the omission to be supplied by parol. This rule has been recognized and enforced in many jurisdictions in cases similar to the one at bar and seems well settled: 20 Am. and Eng. Enc. Law (1st ed.), 501; 1 Dillon on Municipal Corporations, §§ 300, 301; Tiedeman on Municipal Corporations, § 108; *Gillett v. Commissioners*, 18 Kan. 410; *Chicago Railway Company v. Commissioners of Stafford County*, 36 Kan. 121 (12 Pac. 593); *Rock Creek Township v. Coddling*, 42 Kan. 649 (22 Pac. 741); *Athearn v. Independent District*, 33 Iowa, 105; *Jordan v. Osceola County*, 59 Iowa, 388 (13 N. W. 344); *Morgan v. Wilfley*, 71 Iowa, 212 (32 N. W. 265); *Taymouth v. Koehler*, 35 Mich. 22; *School District v. Clark*, 90 Mich. 435 (51 N. W. 529); *German Insurance Company, of Freeport v. Independent School District of Milford*, 25 C. C. A. 492 (80 Fed. 366). It follows that the judgment of the court below must be reversed, and a new trial ordered.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

KOSHLAND v. HOME INSURANCE COMPANY.

(49 Pac. 864.)

31	321
31	363
31	408
31	371
33	108

1. **INSURANCE—NEW MORTGAGES.**—Where property has been insured with knowledge of existing incumbrances, the mortgaging of such property without the consent of the company to provide funds which are used to pay off the existing incumbrance is not a violation of a provision that the policy shall be void "if the subject of the insurance be or become incumbered by mortgage."
2. **IDEM.**—A subsequent change in the form of the incumbrances on insured property, which were known when the policy was issued, will not work a forfeiture of the policy, so long as the amount is not increased.

From Umatilla: ROBERT BAKIN, Judge.

On the nights of the ninth and tenth of June, 1895, one Charles Cunningham lost by fire a large amount of property in Umatilla and Morrow counties, which was insured in several different companies, the defendant, the Home Mutual Insurance Company, being among the number. Its policy was for \$11,825 on three frame buildings and a quantity of hay therein; also, \$4,680 on sheep, while contained in a building described in the policy. After the fire Cunningham assigned the policy and all his rights thereunder to the plaintiff; and, the defendant having denied liability, this action was brought to recover on the policy. Within the time required to answer, the defendant appeared and filed a petition and bond for the removal of the cause to the Circuit Court of the United States for the District of Oregon, on the ground that the controversy is between citizens of different states, and that it is a nonresident of this state. This

petition was denied, and defendant answered, setting up, among other things, as a defense to the action, the violation of a condition of the policy of insurance which provides that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the subject of the insurance be or become incumbered by mortgage, trust deed, judgment, or otherwise," by the assured executing, without the knowledge or consent of the defendant company, a mortgage upon the property covered by the policy, for the sum of \$28,000. The reply admits the execution of the mortgage as charged, but avers that at the time of the issuance of the policy of insurance the real property upon which said buildings were situate was incumbered by three certain mortgages, amounting in the aggregate to the sum of \$25,000, which sum was also secured by a chattel mortgage on the sheep covered by the policy, and that the risk was accepted and the policy issued by the defendant company with full knowledge of the existence of these incumbrances; that after the issuance and delivery of the policy the sum secured by the mortgages referred to became due, and, the holders thereof demanding payment, Cunningham paid them with money borrowed of the plaintiff, to secure the payment of which he made, executed, and delivered the mortgage referred to in the answer, which covered not only the property included in the prior mortgages, but a large amount of other property, of the alleged value of \$28,000. Trial was had, resulting in a verdict and judgment in favor of plaintiff for the sum of \$6,375, and defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *Chamberlain & Thomas*, with an oral argument by *Mr. George E. Chamberlain*.

For respondent there was a brief and an oral argument by *Messrs. John J. Balleray and Charles H. Carter*.

MR. JUSTICE BEAN, after making the foregoing statement, delivered the opinion of the court.

The record contains numerous assignments of error, but the only ones relied upon at the argument or discussed in appellant's brief arise out of the refusal of the trial court to surrender its jurisdiction on the filing of the petition and bond by the defendant for removal to the federal court, and in refusing to rule that the mortgage of \$28,000 to the plaintiff, referred to in the pleadings, was a violation of the condition of the policy against incumbrances, and rendered it void. Upon the first question but little need be said. While the petition for removal avers that the plaintiff was at the time of the commencement of the action, and still is, a citizen of the State of Oregon, and that the defendant was and is a citizen of the State of California, it was nevertheless admitted in open court by the defendant at the hearing, and made a part of the record, that the allegations of the petition on that subject are not true, but that plaintiff is, and was at the time of the commencement of the action, a citizen and resident of the State of California. The petition was treated in the court below as if it had been amended accordingly, and will be so consid- •

ered here. This being so, the case is clearly not one of which the federal courts are given jurisdiction by the first section of the act of congress of March 3, 1887, on the ground of diversity of citizenship, because both parties are residents of the same state, and the jurisdiction of such courts on removal by the defendant is limited by that section to such cases as might have been commenced therein by original process: *Railroad Company v. Davidson*, 157 U. S. 201 (15 Sup. Ct. 563). Hence the trial court properly refused to surrender its jurisdiction, upon the facts appearing of record in that court.

1. Upon the other point the record shows that, at the time the policy of insurance in suit was issued, Cunningham, the assured, was the owner of about twelve thousand acres of land in Umatilla and Morrow counties, with the buildings and appurtenances thereon, and was also the owner of about eighteen thousand or twenty thousand head of sheep ranging on said land; that the real estate was incumbered by three separate mortgages to secure the sum of \$26,415.38 in the aggregate, which sum was likewise secured by a chattel mortgage on the sheep referred to, and the contract of insurance was made and the policy issued, covering some of the buildings on the mortgaged property and their contents, and \$4,650 on the sheep, with knowledge that the property was so incumbered. After the policy had been issued and delivered, and before the fire, Cunningham borrowed of plaintiff the money with which to pay off and discharge these incumbrances, and gave as security therefor a mortgage not only on the property included in the prior mortgages,

but on a large amount of other property, and this is the mortgage referred to in the pleadings. There is no contention that the policy is void on account of the incumbrances on the property at the time the insurance was effected, but the question presented for decision is whether, after the issuance and delivery of a policy of insurance, the giving of a mortgage by the assured on the property covered thereby, without the consent of the company, to secure the funds with which to pay and discharge an incumbrance existing thereon, is a violation of the provision that it shall be void "if the subject of the insurance be or become incumbered by mortgage" without the consent of the company indorsed thereon in writing. Now, if this clause in the policy is to be given a strict and literal interpretation, it would seem that any incumbrance given by an assured after the policy has been issued and delivered is a violation thereof, whatever may have been the purpose for which it was given. But courts are always reluctant to enforce forfeitures; and when one mortgage is given practically as a substitute for another, as in this case, there is no reason, in our opinion, for doing so. The rule that an incumbrance in violation of the terms of a policy of insurance works a forfeiture is based on the theory that it increases the risk; for, if a man may insure his property to its full value, and then incumber it to its full value, it may easily be seen how it may be turned into a source of profit: *Brown v. Insurance Company*, 41 Pa. St. 187. But, where the policy is issued with knowledge by the company of an existing incumbrance, a subsequent renewal thereof, or a new incumbrance

given for the purpose of discharging the old one, does not increase the risk, because the incumbrance practically remains the same. By issuing the policy the company contracts to accept the risk, incumbered as the property then is; and a subsequent change in the form of the incumbrance, or the substitution of one creditor for another, is not a violation of the spirit or intent of the contract, and therefore ought not to work a forfeiture of the insurance. If the assured cannot use the property covered by the policy as security for the money with which to pay off an incumbrance existing at the time it is issued, he is either at the mercy of the company, or else must suffer the risk of having his property sold under a decree of foreclosure. There is neither reason nor justice in a doctrine which requires him to suffer in that way, when no possible harm can be done to the insurer by substituting one creditor for another, or one security for another. The risk remains the same, for the interest of the assured in the property is unchanged. There is some diversity of opinion in the adjudged cases as to whether, after an existing mortgage has been paid and discharged, the assured can give another for the same or a less amount without violating the condition of the policy against incumbrances; but, where the new mortgage is given merely in lieu of an existing incumbrance, reason as well as authority favors the doctrine that it does not increase the risk, and therefore is no violation of the conditions of the policy against incumbrances: *Bowlus v. Phoenix Insurance Company*, 133 Ind. 106 (20 L. R. A. 400, 32 N. E. 319); *Kister v. Lebanon Mutual Insurance Company*, 128 Pa. St. 553

(5 L. R. A. 646, 15 Am. St. Rep. 696, 18 Atl. 447); *Dwelling House Insurance Company v. Gould* (Pa. Sup.), 19 Atl. 793; *Weiss v. Insurance Company*, 148 Pa. St. 349 (23 Atl. 991); *Kansas Fire Insurance Company v. Saindon*, 53 Kan. 623 (35 Pac. 15); *Georgia Home Insurance Company v. Stein*, 72 Miss. 943 (18 So. 414); *Russell v. Insurance Company*, 71 Iowa, 69 (32 N. W. 95). It follows that the judgment must be affirmed, and it is so ordered.

AFFIRMED.

[Decided October 26, 1897.]

ON REHEARING.

MR. JUSTICE BEAN delivered the opinion of the court.

2. During the progress of the trial, defendant offered to prove that the amount of the incumbrances on the property at the time the insurance was effected had been reduced by payments, and did not exceed \$16,000 at the time plaintiff's mortgages were given, and therefore the statement in the opinion heretofore filed that they were given for the purpose of raising money with which to pay prior incumbrances was not strictly accurate. But, in our opinion, the evidence offered was immaterial. The question was not so much whether the amount secured by plaintiff's mortgages exceeded that actually due on the prior liens at the time of their execution as it was whether the risk had been thereby increased. The rule that an incumbrance on insured property, in violation of the terms of the policy, works a forfeiture, proceeds upon the theory that it increases the hazard, by reducing the

interest of the assured in the property covered by the policy, and consequently his interest in its preservation. But the reason of this rule ceases where the policy is issued with knowledge of existing incumbrances. The insurance in that case in effect contracts to accept the risk according to the assured's present interest in the property, and a subsequent change in the form or amount of the incumbrances ought not to work a forfeiture of the policy so long as the amount of such incumbrances is not increased. The interest of the assured remains unchanged, and the moral hazard the same. It is true, there is some conflict in the authorities upon this question; but we take this to be the better rule, and supported by the weight of authority. See cases cited in the original opinion.

REHEARING DENIED.

[Argued March 4; decided April 12, 1897.]

HAMILTON v. GAMBELL.

(48 Pac. 483.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—GARNISHMENT.—Portland City Charter, § 118, providing for the taking of bonds for the faithful performance of a contract for improvements, and also to secure material men and others their claims under such contract, is not violated by an ordinance which provides that where public improvements have been accepted by the proper authorities a material man may file his claim with the city auditor within five days thereafter, and directs that the auditor shall withhold the amount due the contractor till the amount of the claim is adjusted, and that on the failure of the contractor and the claimant to agree, and on the claimant's commencing within twenty days an action to recover the claim, and causing a writ of attachment to be issued and notice thereof to be served on the auditor, the auditor shall withhold a warrant from the contractor till a final determination of the rights of the parties. The section in the charter requiring a bond with certain conditions is not

a limitation on the manner in which contracts may be drawn, but is a proviso that no contract shall be made without that kind of bond. The regulation of the ordinance is a reasonable one, intended to comply with the moral duty resting alike on public corporations and private persons to see that those who perform services for them, either directly or indirectly, are paid, and it does not subject the city to garnishment.

From Multnomah: E. D. SHATTUCK, Judge.

Replevin by A. Hamilton against A. N. Gambell, as auditor of the City of Portland, to recover the possession of certain warrants. A demurrer to the answer having been sustained, defendant appeals.

REVERSED.

For appellant there was a brief over the names of *William M. Cake*, city attorney, and *Frederick L. Keenan*, with an oral argument by *Mr. Cake*.

For respondent there was a brief over the name of *Hume & Hall*, with an oral argument by *Mr. John H. Hall*.

Opinion by MR. JUSTICE WOLVERTON.

This is an action for the recovery of three certain city warrants drawn upon the treasurer of the City of Portland, and signed by its mayor and auditor, of the aggregate value of \$862.50. The defendant, who is the auditor of the city, interposed two defenses: *First*, that he withholds and detains the warrants in pursuance of certain provisions of Ordinance No. 9183, which are, in effect, as follows:—

Section 1. Where any work is done under contract with the city for street or sewer improvements,

and has been accepted by the common council, the auditor is required to withhold the issuance of warrants in payment therefor for a period of five days, after which he shall issue and deliver the same; *provided*, no person who has furnished material or labor, actually used, shall have previously filed in his office an unadjusted claim therefor.

Section 2. Any person, firm, or subcontractor furnishing materials or labor, actually used or employed in such improvements, at the request of the contractor, may at any time before warrants are delivered as provided for in section 1 file his or their claim therefor in writing with the auditor, stating the amount thereof, which shall be withheld from the amount due such contractor until such claim is adjusted and agreed upon as provided in the following section.

Section 3. If the amount of the claims is agreed upon and adjusted by the claimant and contractor, the auditor shall deliver warrants in accordance with the adjustment; otherwise he shall retain them for a period not to exceed twenty days from the date of the acceptance of the work, when he shall deliver the same to the contractor, unless the claimant shall, previous to the expiration of said twenty days, commence an action upon the claim, and cause a writ of attachment to be issued and notice thereof in writing to be served upon the auditor, in which case he shall withhold the warrants until the rights of the respective parties are finally determined.

Section 5. All contracts for such improvements shall provide that the same shall be subject to the provisions of the ordinance.

It appears that the Andrews Lumber Company had a claim of \$862.50 against the plaintiff, alleged to be for lumber furnished and used in city improvements, which claim it filed with the auditor, and sued upon as contemplated by the ordinance, and had notice in writing of the commencement of the action and issuance of the writ of attachment served upon the auditor.

And *second*, it is alleged, by way of estoppel, that in pursuance of advertisements for bids for the improvements, with notice that the contract therefor was to be let subject to the provisions of the foregoing ordinance, plaintiff bid for the work, and thereafter, on April 7, 1896, entered into a contract with the city whereby it was provided, among other things, that the contract was made and entered into subject to the provisions of ordinance No. 9183, which was expressly made a part of the same, and at the same time entered into bond with the city for the faithful performance of the specifications of said contract subject to the provisions of said ordinance. A demurrer was interposed to the affirmative matter of the answer, which was sustained; and, defendant refusing to plead further, judgment was entered for plaintiff, from which defendant appeals.

In support of the demurrer, it is urged that the city council was without power or authority, under the charter of the City of Portland, to enact ordinance No. 9183, and that it is, therefore, *ultra vires* and void. Section 118, of the charter, is cited as containing the only provisions to be found which in any way lend support or authority for the enactment, and it is

claimed that, as it points out and prescribes a certain measure that the council shall adopt for the protection and security of laborers, material men, and subcontractors in their just claims for labor and materials furnished contractors with the city while making improvements, the particular measure is exclusive of all others intended for the security and protection of the class of individuals designated. It is as follows: "The council must provide by ordinance for the time and manner of doing the work on any proposed improvement subject only to the following restrictions, viz": After directing what notice shall be given, and prescribing the manner of letting the contract, it continues: "The council shall provide for taking security by good and sufficient bonds for the faithful performance of any contract let under its authority, and to secure laborers and material men and subcontractors their just claims under said contracts, and also the faithful maintenance and guarantee of such work for five years or such other time as the council may prescribe, and the provision thereof shall be enforced by an action in the name of the City of Portland." Preliminarily, we may say that the word "provision," in the latter clause, was evidently intended to read "provisions," so as to cover all the enumerated stipulations, as the context does not seem suited to any other interpretation. But as to the powers of the council: The section does not purport to be restrictive of any other or different measures that the council may see fit, in its wisdom, to adopt for the accomplishment of the purposes contemplated by the charter. Indeed, it is but a fair and just implication and interpretation

from the language employed that the only restriction imposed upon the power of legislation touching the subject is that the particular kind or method of security pointed out shall not be overlooked, or, rather, that it shall in any case be adopted in providing for the improvements designated. "The council shall provide by ordinance * * * subject only to the following restrictions": Is not here an implied latitude for legislation extending beyond the enumerated restrictions? It would seem from the reading that the power was otherwise limitless for the accomplishment of the specified purposes. This is not a case where the mode of contracting is specially and plainly prescribed and limited, but where a designated mode is appointed, which constitutes the only restriction, and it cannot, therefore, become the measure of the power. That the section in question, when considered as a whole, confers the power upon the city to enter into contracts with individuals for making the specified improvements, will hardly be questioned. But, be this as it may, there is always an implied or incidental authority to contract obligations necessary to the execution of special powers and functions with which the city is endowed by its charter: 1 Dillon on Municipal Corporations (4th ed.), §§ 443, 447. So, also, the power to contract, unless limited or restricted by certain conditions or a particular mode or method, necessarily carries with it the power to impose any reasonable regulations not contrary to law or public policy which may seem most conducive to the successful accomplishment of the purposes in hand.

It is said that municipalities, as well as individuals,

have moral purposes to subserve in their dealings, and, while they may not be legally compellable to recognize such purposes, yet it is entirely proper for them to do so, and they are not to be excused for a dereliction of duty in this regard. Accordingly, it has been held that it was competent for a municipality to enter into stipulations with a contractor for the construction of a public building, making his payment conditional upon his performing the obligations which he may assume towards his subcontractors and those furnishing labor and materials in the course of the fulfillment of the contract: *Knapp v. Swaney*, 56 Mich. 345 (56 Am. Rep. 397, 23 N. W. 162). The language of Judge COOLEY is so pertinent here we may be pardoned if we quote somewhat at length. He says: "A corporation, when constructing a public building or other public work, is chargeable with moral duty, as an individual would be, to see that it is so constructed that people may not be injured in coming near to or making use of it in a proper manner. In some cases they may not be legally responsible for failure to perform this duty; but where the moral obligation exists, it cannot be said that any provision for its performance, not improper in itself, is *ultra vires*. A county may go to great pains and great expense to make its courthouse unquestionably safe, that individual citizens may not suffer injuries consequent upon its construction. But, if it may do this, it would be very strange if it were found lacking in authority to stipulate in the contract for the building that the contractors, when calling for payment, shall show that they are performing their obligations to

those who supply the labor and materials, and that the county is not obtaining the building at the expense of a few of its people." As approving the doctrine, see, also, *Sample v. Hale*, 34 Neb. 220 (51 N. W. 837). So we may infer that it was competent for the municipality in the present case to provide by ordinance for the further protection and security of subcontractors, laborers, and material men in their just claims against original contractors with the city for labor and materials furnished them, and of which the city obtains and may enjoy the benefit, by enacting that the contractor shall settle with such claimants before he will be entitled to his stipulated compensation; and the conditions touching the time during which the amount due the contractor shall be withheld are certainly reasonable.

But it is insisted that the ordinance contravenes the recognized policy of the state, which exempts municipalities and their officers from attachment and garnishment. We do not think that the ordinance was intended to make the city the subject of garnishment. It merely prescribes the conditions under which the contractor shall become entitled to the warrants which constitute his compensation for stipulated services, and in the meantime the auditor is directed to withhold them. It was surely competent for the city to impose a condition that the contractor's compensation should not fall due for five days after the completion of the work; and, if for that length of time, why not for twenty days? And, in view of its moral obligation to see that persons who have furnished labor and materials for the use of the munici-

pality shall not go away empty handed, it does not seem unreasonable to require of the contractor that he settle with those furnishing such labor and material at his request before he shall be entitled to his wages, and impose conditions accordingly. Such is the purpose of the ordinance, and the direction to withhold the warrants after action begun and writ of attachment issued, and notice thereof served upon the auditor, is but a means of conserving the purpose. The required stipulations are but conditions of the time and manner of payment, of which every person who contracts with the city must take notice, and to which he must voluntarily subscribe if he would make the improvements. We think the city council was invested with ample power and authority to enact the ordinance in question, and that the conditions complained of are not *ultra vires* or without validity, as it pertains either to the ordinance or the contract made in pursuance thereof, and, therefore, that the defense interposed was sufficient in law, if sustained by the facts, to defeat the action. The cause will be remanded, with directions to overrule the demurrer.

REVERSED.

[Decided April 19, 1897.]

CONTINENTAL INS. CO. v. RIGGEN.

(48 Pac. 476.)

1. REPEAL OF STATUTE—INSURANCE.—Sections 8 and 9 of the law of 1864, requiring foreign insurance companies doing business in Oregon to execute and record a power of attorney in each county where they should have resident agents (Laws 1864, p. 745, Hill's Ann. Laws, § 3276), were impliedly repealed by the statute of 1887 on the same subject (Laws 1887, p. 118, Hill's Ann. Laws, §§ 3563-3586). This latter statute prescribed in detail the conditions on which foreign insurance

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81	336
735	174
735	401

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39	536

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41	512
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46	332

companies might be admitted into this state, and is plainly a substitute for the prior law so far as it refers to appointing a person on whom service of summons may be made: *Little v. Cogswell*, 20 Or. 345, applied.

2. FOREIGN INSURANCE COMPANIES.—The requirement of section 3580, Hill's Ann. Laws, as amended (Laws 1889, p. 64), that every foreign fire and marine insurance company doing business in this state shall have one head office in the state under the charge of a general agent, is not a condition precedent to the right of such company to do business in this state, and a failure to comply therewith will not render void and unenforceable a contract of such company made while carrying on business here under a license regularly issued by the insurance commissioner, although it might afford some ground for a proceeding by the state.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit by the Continental Insurance Company of New York against S. B. Riggen and wife to foreclose a mortgage. A demurrer to a plea in abatement was sustained and a final decree entered as prayed for, from which defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *George, Gregory & Duniway*, with an oral argument by *Mr. Ralph R. Duniway*.

For respondent there was a brief and an oral argument by *Mr. John C. Leasure*.

Opinion by MR. JUSTICE BEAN.

This is a suit to foreclose a mortgage upon certain real estate in Multnomah County, executed and delivered to the plaintiff by the defendants as security for the payment of a balance due the plaintiff from defendant S. B. Riggen and one T. M. Riggen, former

agent of the company, for premiums on fire insurance business previously done in this state. The only defense is that the contract upon which the suit is brought is void because at the time of its execution the plaintiff was a fire insurance company organized and existing under the laws of the State of New York, and carrying on business in this state without first having complied with the provisions of sections 3276 and 3580 of Hill's Ann. Laws, by executing and recording a power of attorney, appointing a resident agent, and maintaining a head or general office in the state under the charge of a general agent. The court below held this defense insufficient, and, the defendants declining to answer or plead further, a decree was entered in favor of plaintiff, as prayed for in the complaint, from which the defendants bring this appeal.

1. In 1864 the legislature passed an act to regulate and tax foreign insurance, banking, express, and exchange corporations or associations, in which it was provided that, before doing business in the state, any of such corporations must deposit with the treasurer of the county in which its principal office or agency is maintained the sum of \$50,000, in interest-bearing bonds of the United States, as security for persons transacting business with such corporation in the state, and, in addition thereto, must execute and acknowledge a power of attorney appointing a resident agent or attorney, with authority to accept service of process for the corporation, and upon whom service could be made, and cause the same to be recorded in each county where it had a resident agent: Gen-

eral Laws 1864, p. 745. This act was subsequently amended in some matters not material to any question presented at this time, and, as so amended, is published as chapter XXIV of the Miscellaneous Laws of the compilation of 1872 by Deady and Lane. In 1887 (Laws 1887, p. 118), the legislature passed an act entitled "An Act to Regulate and License Insurance Business in the State of Oregon," being chapter L of Hill's Ann. Laws; and the principal question on this appeal is whether the latter act repealed by implication the provisions of the former, requiring a foreign fire insurance company, before transacting business in the state, to execute and record in each county where it has a resident agent a power of attorney appointing a resident and citizen of the state as its agent, upon whom service of summons may be made. Repeals by implication are never favored, and, when there are two acts upon the same subject, effect will be given to both, if possible; but when they are repugnant, so that both cannot stand, the latter, without any repealing clause, will operate as a repeal of the former; and, even when they are not repugnant, if the new statute revises the whole subject-matter of the old, and is plainly intended as a substitute therefor, it will likewise operate as a repeal of the former, although it contains no express provision to that effect: *Little v. Cogswell*, 20 Or. 345 (25 Pac. 727), and authorities there cited. Now, it is manifest, from an examination of the act of 1887, that it was intended to and does revise the whole subject of fire insurance business in the state, and prescribes the terms and conditions upon which both domestic and foreign insurance

companies may be permitted to do business here, and therefore, under the rule referred to, clearly operates as a repeal of the provisions of the former act upon the same subject, so far as it affects such companies. It appoints an insurance commissioner charged with the duty of seeing that the laws of the state respecting insurance companies are faithfully executed; prohibits any company, firm, or individual from transacting life, fire, or marine insurance in the state without a license from such commissioner; prescribes in detail the terms and conditions upon which foreign insurance companies may be admitted into the state, and upon which they shall be entitled to do business herein, among which is a provision that they shall file with the insurance commissioner a power of attorney authorizing a citizen and resident of the state to accept service of process in any proceeding in any of the courts of the state or of the United States therein, and upon whom service may be made; and by section 17 it is expressly declared that "the admission of an insurance company to do business in the state shall not be denied by the commissioner when it makes and tenders a full compliance with the provisions of this act." It is clear, therefore, that, when a foreign insurance company complies with the conditions precedent as prescribed in the act of 1887, it is entitled to a license to do business in the state, although it has not complied with the provisions of the former law on the subject, and hence such law must be regarded as repealed by implication. And when so licensed it is lawfully here, and may enforce its contracts in the courts of the state. It is admitted that at the time

the note and mortgage in question were executed the plaintiff had fully complied with all the terms and conditions precedent to its right to do business in the state as prescribed in the act of 1887, and that it had been duly licensed by the insurance commissioner for that purpose, and hence it is no defense to this suit that it had not executed and recorded the power of attorney required by sections 8 and 9 of the act of 1864.

2. The other defense sought to be made is only deserving of a very brief notice. It is sufficient to say that the provisions of section 3580 of Hill's Ann. Laws, as amended in 1889 (Laws 1889, p. 64), that every foreign fire and marine insurance company doing business in this state shall have one head or general office in the state, under the charge of an officer known as its "general agent," to whom all other agents shall report not less frequently than once a week, etc., is not made a condition precedent to the right of such a corporation to do business in the state, and a failure to comply therewith will not render the contract of a foreign insurance company doing business in this state under a license regularly issued by the insurance commissioner void and unenforceable in the courts of the state. A failure in this regard may perhaps be a sufficient ground for the revocation of a license, or for some proceeding by the state to prevent the delinquent company from doing business here, but it constitutes no defense in behalf of a private individual to an action brought against him on a contract made in this state between the company and himself. It fol-

lows that there is no error in the record, and the decree of the court below is affirmed.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

RICHMOND v. McNEILL.

(49 Pac. 379.)

CONTRIBUTORY NEGLIGENCE A BAR TO RECOVERY OF DAMAGES.—A person who, by a slight effort and without danger to himself, would have avoided the destruction of his property, but did not do so, is chargeable with such contributory negligence as will prevent his recovery from the person who caused the injury: *Eaton v. Oregon Railway and Navigation Company*, 19 Or. 391, approved.

RAILROAD FIRE — NEGLIGENCE — NONSUIT.—A plaintiff in an action against a railroad company for damages to land caused by fire which spread from combustible material negligently left along the company's right of way and ignited by a passing locomotive, cannot be charged with such negligence as will support a nonsuit, when his servant who was in charge of the property went with reasonable diligence to the scene of the fire, and made some effort to perform his duty, the degree of which is a question of fact for the jury.

PROVINCE OF JURY — QUESTION OF FACT.—Where different deductions may reasonably be drawn from testimony the matter should be left to the jury.

RAILROADS — PRESUMPTION OF NEGLIGENCE.—Evidence tending to show that a railway company negligently left along its track combustible material, which was discovered to be on fire soon after the passing of a train, and plaintiff thereby suffered damage, raises an inference that the fire was caused by sparks from the engine, which the company must rebut.

From Union: STEPHEN A. LOWELL, Judge.

Action by F. L. Richmond and W. T. Wright against E. McNeill, receiver of the Oregon Railway and Navigation Company. From a judgment for defendant, plaintiffs appeal.

REVERSED.

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36	148
31	342
45	221

For appellants there was an oral argument by *Mr. George E. Chamberlain*, with a brief over the names of *Frank A. E. Starr*, and *Chamberlain & Thomas*, urging these points:

The rule is well established by the great preponderance of authorities that a railway company must keep its track and right of way clear of all such substances as are liable to be ignited by sparks or cinders from its engines. This is a duty clearly implied in the grant or charter which confers the right to use steam engines. As fire is a dangerous agent, it is but reasonable to presume that the legislature in making the grant annexed the implied condition that the track and right of way shall be kept in such condition as to avoid danger from fire spreading therefrom: 8 Am. and Eng. Enc. Law (1st ed.), 14; *Jones v. Michigan Central Railway Company*, 59 Mich. 437; *Richmond, etc., Railway Company v. Medley*, 75 Va. 499; *Indiana Railway Company v. Oberman*, 110 Ind. 538; *Gibbon v. Wisconsin Railway Company*, 66 Wis. 161; *Delaware, etc., Railway Company v. Salmon*, 39 N. J. L. 299; *Toledo, etc., Railway Company v. Ward*, 48 Ind. 476; *Pittsburg, etc., Railway Company v. Nelson*, 51 Ind. 150; *Burlington, etc., Railway Company v. Westover*, 4 Neb. 268; *Herry v. Southern Pacific Railway Company*, 59 Cal. 578; *Henry v. Southern, etc., Railway Company*, 50 Cal. 176; *Flynn v. San Francisco, etc., Railway Company*, 40 Cal. 14; *Kesee v. Chicago, etc., Railway Company*, 30 Iowa, 78; *Troxler v. Richmond, etc., Railway Company*, 74 N. C. 377; *Kellogg v. Chicago, etc., Railway Company*, 26 Wis. 223; *Brighthope Railway Com-*

pany v. Rogers, 76 Va. 443; *Pittsburg, etc., Railway Company v. Nelson*, 51 Ind. 150.

Where the plaintiffs use their land in a natural and proper way, they are not chargeable with contributory negligence from a failure to take precautions against the negligence of a railway company: *West v. Chicago Railroad Company*, 35 N. W. 479; *Burlington Railroad Company v. Westover*, 4 Neb. 268; *Kellogg v. Chicago, etc., Railroad Company*, 26 Wis. 223; *Clemens v. Hannibal, etc., Railroad Company*, 53 Mo. 366; *Patton v. St. Louis, etc., Railroad Company*, 87 Mo. 117; *Cook v. Champlain*, 1 Denio, 91; *Fero v. Buffalo, etc., Railroad Company*, 22 N. Y. 209; *Kalbfeisch v. Long Island Railroad Company*, 102 N. Y. 520; *Lindsay v. Winona & St. Paul Railroad Company*, 29 Minn. 411; *Karson v. Milwaukee, etc., Railroad Company*, 29 Minn. 12; *Philadelphia Railroad Company v. Hendrickson*, 80 Pa. St. 182; *Philadelphia Railroad Company v. Schultz*, 93 Pa. St. 341; *Richmond, etc., Railroad Company v. Medley*, 75 Va. 499.

Whether or not the plaintiffs were negligent in the matter of extinguishing a fire originating on the defendant's right of way and communicating to their land is a question of fact to be submitted to the jury under proper instructions: *Karson v. Milwaukee, etc., Railroad Company*, 29 Minn. 12; *Lindsay v. Winona, etc., Railroad Company*, 29 Minn. 411; *Pacific Railroad Company v. Brady*, 17 Kan. 380; *Kansas City Railroad Company v. Owen*, 25 Kan. 419; *Missouri Pacific Railroad Company v. Connell*, 30 Kan. 35; *Murphy v. Chicago, etc., Railroad Company*, 45 Wis. 222; *Ross v. Boston, etc., Railroad Company*, 6 Allen, 87; *Diamond v.*

Northern Pacific Railroad Company, 6 Mont. 580; *Fero v. Buffalo, etc., Railroad Company*, 22 N. Y. 209; *Illinois Central Railroad Company v. Frazier*, 64 Ill. 29.

Where there is evidence tending to show that the fire originated through carelessness of the defendant in allowing combustible material to accumulate on the right of way, it imposes upon the defendant the burden of proving that he had used proper precautions for confining sparks and cinders: *Patterson v. Chesapeake, etc., Railroad*, 26 S. E. 393; overruling *Bernard v. Railroad Company*, 85 Va. 792. See, also, 2 Sherman and Redfield on Negligence, § 673; *West v. Chicago, etc., Railway Company*, 35 N. W. 479.

For respondent there was an oral argument by Messrs. Joel M. Long and Thomas H. Crawford, with a brief over the names of J. M. Long, T. H. Crawford, and Cox, Cotton, Teal & Minor, to this effect:

There being no evidence of negligence as charged in the complaint, there was no evidence that the fire started on the right of way. There was no evidence that the fire started from the locomotive or engine, while, on the contrary, the plaintiffs' evidence showed that the engine was properly operated, and that it was not emitting any sparks or fire. The only theory upon which the plaintiffs can recover would be that the train of cars passed about half an hour prior to the time when the fire was first seen, and about five minutes afterward men were seen going up along or near the track and at the point where the fire was started. Likewise the evidence of the plaintiffs' advancing,

that this peat land was dry and fire had been known to lay in it for two years, and was known to be on fire from October to December, becomes a theory or conjecture as to how the fire started, and in such case it is the duty of the court to direct for the defendant: *Hines v. Railway*, 75 Iowa, 597; *Asback v. Railway*, 74 Iowa, 248; *Wheelan v. Railway*, 85 Iowa, 175; *Railway v. State*, 73 Md. 74; *Railway v. State*, 71 Md. 594; *Parrott v. Wells*, 15 Wall. 524-537.

Where the plaintiffs' servant was in a position to have prevented any damage from fire and made no effort to do so, the plaintiff can not recover from the defendant, even though evidence may disclose that the fire was communicated by sparks from the engine: *Railroad v. McClellan*, 42 Ill. 355; *Potter v. Railway*, 21 Wis. 377-382; *Railroad v. Pennell*, 94 Ill. 448-454; *Railway v. Pindar*, 53 Ill. 447-451; *Railway v. Hecht*, 38 Ark. 357-370; *Stebbins v. Railway*, 54 Vt. 464; *Wharton on Negligence*, (2d ed.), § 877; *Doggett v. Railway*, 78 N. C. 305-311; *Kellogg v. Railway*, 26 Wis. 223-245-257; *Snider v. Railway*, 11 W. Va. 14-37-38; *McNarra v. Railway*, 41 Wis. 69-75; *Eaton v. Railway*, 19 Or. 391.

Opinion by MR. CHIEF JUSTICE MOORE.

This is an action by F. L. Richmond and W. T. Wright against E. McNeill, as receiver of the Oregon Railway and Navigation Company, a corporation, to recover damages for injury to land belonging to them in Union County, Oregon, by the burning of the soil thereof and the grass, fence posts, and wire thereon, the destruction of which is alleged to have been caused

by the negligent operation of a railway locomotive on the line of said company, whereby sparks were emitted therefrom, which, falling upon a quantity of dry grass and other inflammable material, carelessly permitted by the defendant, his agents and servants, to accumulate on the right of way of the railway company, caused the same to ignite, and the fire kindled thereby spread to plaintiffs' adjoining premises, causing the injury of which they complain. The complaint is in the usual form, and, issue being joined thereon, at the trial the plaintiffs introduced their evidence, and rested, whereupon the court, considering that neither the plaintiffs nor their agents had exercised such a degree of care and diligence in protecting their property from the ravages of the fire as was reasonably within their power, upon motion therefor gave a judgment of nonsuit, from which the plaintiffs appeal.

The judgment complained of was evidently based upon the assumption that, although the fire which caused the injury was negligently emitted from a locomotive, and, communicating with the dry grasses and other inflammable materials which were carelessly permitted to accumulate on the right of way, spread therefrom, and burned the plaintiffs' property, yet that, by the exercise of reasonable care and diligence on their part, the injury of which they complain might have been averted. An examination of the evidence adduced by plaintiffs tends to show that on October 25, 1895, they were the owners and in the possession of six hundred and fifty acres of peat land, covered with rank grasses and tules, the soil of which was composed of combustible material, easily ignited; that

the line of the railway of the said corporation runs across this land, and that on October 25, 1895, between six and seven o'clock in the morning, a freight train going east passed over the same, and soon thereafter one S. P. Gates, an employee of the plaintiffs, who was about three quarters of a mile therefrom, discovered smoke ascending from what he supposed to be the right of way through the land in question. Gates testified that within five minutes after the train passed he saw smoke, which he watched for about ten or fifteen minutes; that he then went into the house to give the alarm of fire, where he remained about five minutes; he thereupon went to the barn to hitch up a team, which occupied about ten minutes, and, neither of the plaintiffs nor their superintendent being present, he, in company with his wife, two children, and another employee, drove to the fire, to see if they could do anything to guard the property; that it required about ten or fifteen minutes to make the journey, and upon their arrival they went along the water ditch on the premises to see that the fire did not cross it into the land lying on the opposite side, but, having no means with which to combat the fire, and believing that it would be useless to attempt it even if they were supplied therewith, they made no effort in that direction. This witness also says that he saw the section men going west that morning; that they met the freight train at plaintiffs' land, where they removed their hand-car from the track, to allow the train to pass, after which the car was replaced, and they resumed their journey. Alexander Ferguson, another witness, who lived about two miles from the scene of

the fire, saw the train pass, and, soon after passing plaintiffs' land, he saw smoke, which he thought might have been caused by section men burning railroad ties.

From this evidence, can it be said that plaintiffs' agents did not exercise that degree of care and diligence which it was possible for them to exert in protecting the property from destruction? The rule is settled in this state that if a party, by slight effort, and without danger, could have avoided the destruction of his property by fire negligently set by another, and refuses to put forth a reasonable exertion to arrest the impending injury, such failure on his part will preclude his right of recovery: *Eaton v. Oregon Railway & Navigation Company*, 19 Or. 391 (24 Pac. 415). In *Railroad Company v. McClelland*, 42 Ill. 355, the court, upon defendant's request, refused to give the following instruction: "If the son and servant of the plaintiff saw the fire in time to put it out, while it was on the right of way, before it reached the plaintiff's meadow, it was his duty to do so. And if, through his negligence in not doing so, the fire consumed the property of the plaintiff, the defendant would not be liable therefor." And, judgment having been rendered in favor of plaintiff, it was reversed on appeal, BREESE, J., in rendering the decision of the court, saying: "It was, then, a proper subject of inquiry by the jury, could the plaintiff's son and servant, by the exercise of reasonable diligence, have prevented the spread of the fire? He saw the fire in time to arrest its progress, or, at any rate, in time to make some effort to that end, but did not choose so to

do. He left the scene, and was absent nearly one hour, and on his return the fire had reached the meadow. Common prudence required he should have made some effort to prevent this, and it was negligence on his part, for which the plaintiff is answerable, that he did not. The fire in the meadow in July may be charged to the negligence of the plaintiff's son, who was in a position to have prevented it. The court should have given this instruction to the jury, and it was error to refuse it." In the absence of the principal, it has been held that it is the duty of the agent or employee engaged with reference to the care or management of any property that is threatened with destruction by fire caused by the negligence of another to make a reasonable effort to avert the injury, and the neglect of the agent or employee in this respect is the failure of the principal: *Railway Company v. Hecht*, 38 Ark. 357. It would seem that the rule announced in this case is correct upon principle, but it cannot reasonably be expected that an agent or employee engaged in another branch or department of the principal's service would exert that same degree of care and protection of property over which he had no control, and in which he had but little interest, as he would over that under his immediate charge, and particularly so when the destruction of the latter class of property might mean a loss of employment. Nor can it be expected that a servant, in the absence of his master, can have the same interest, or exercise a like degree of care, in protecting from destruction property over which he has control as is to be looked for in the owner; but he must, it would seem, make some effort

in that direction: Wharton on Negligence (2d ed.), par. 877. The evidence shows that plaintiffs' superintendent, being obliged to leave the place, appointed Gates to look after it in his absence, and this would doubtless demand of him, in the protection of the property from the ravages of the fire, a degree of care commensurate with his responsibility.

Having shown that a duty devolved upon Gates by reason of his employment, we will review the evidence, together with the reasonable inferences deducible therefrom which tend to show the manner in which he discharged this legal obligation. It will be admitted that fire is a destructive agent, and, ordinarily, he who would avert the effect of its devastation of inflammable property must act promptly upon the discovery of the danger. Applying this rule, which would appear to be just and reasonable, to the acts of Gates, it will be remembered that, after discovering the smoke on what he supposed to be the right of way, he watched it for about ten or fifteen minutes before he made any effort towards preventing a spread of the fire if it were imminent. He saw the section men, when the freight train met them, at a point on the line at which the fire thereafter started; and while he does not testify that he thought the smoke was caused by a fire set by these men to burn railroad ties, Ferguson, another witness, does, although the latter was two miles from the scene of the fire, while Gates was only three-quarters of a mile distant. The jury might reasonably have inferred that Gates did not conclude that there was any danger from the fire, the smoke of which he saw; and, such a conclusion being deducible

from the fact of his observation, the reasonable period of it before he became convinced that the danger was imminent must necessarily have been a question of fact for the jury to ascertain. So, too, the time spent in giving information of the fire, hitching up a team, and making the journey is reasonable, or might be so found by a jury. At least the court could not say, as a matter of law, that the time thus consumed was unreasonable. Gates also says that his object in going to the fire was to see if anything could be done to guard the property, upon arriving at which they went along the water ditch to prevent the fire from crossing it, but that, having no means, they made no effort to; and, if they had tried, they could not have put out the fire. The failure of an owner of property to protect it from destruction by fire when it is within his power to do so with reasonable effort and without danger, thereby precluding his right of recovery for the damages resulting therefrom in case of its loss, must necessarily rest on the doctrine of contributory negligence. The danger incident to the fire, and the effort, when any has been made by the owner of the property, to prevent its destruction, are facts which it is within the sole province of the jury to determine, unless the court can say, as a matter of law, that there was no apparent danger and no reasonable effort. The editor of the American and English Encyclopedia of Law (vol. 4, p. 94, 1st ed.), announcing the rule for determining whose duty it is to measure the degree of care demanded of the owner in such cases, says: "When the facts are disputed, or more than one inference can be fairly drawn from them as to the care, or

want of care, of the plaintiff, the question of contributory negligence is for the jury; but when the facts are undisputed, and but one inference regarding the care of the plaintiff can be drawn from them, the question is one of law for the court." "Negligence, as I understand it," says COOLEY, C. J., in *Detroit, etc., Railroad Company v. Van Steinburg*, 17 Mich. 99, "consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury." The learned justice and text writer elsewhere in the opinion also says: "As a general rule, it cannot be doubted that the question of negligence is a question of fact, and not of law," and cites many cases in support of this proposition. Applying these rules to the conduct of Gates on the occasion of the fire, we think it cannot be said that the only inference deducible therefrom is that he made no reasonable effort to prevent the spread of the fire, or to mitigate the threatened injury. It appears from the evidence that he went with reasonable diligence to the scene of the fire, ready and willing to do what he could, as he says, "to guard the property"; and that he passed along the water ditch several times to see that the fire did not cross it conclusively shows that he made some effort to perform his duty, the degree of which must be a question of fact peculiarly within the province of a jury to ascertain, and by their verdict to say whether his endeavor was all that could have been reasonably performed; and, such being the case, the judgment of nonsuit cannot be sustained upon that ground.

It is contended, however, by counsel for defendant, that, plaintiffs having failed to offer any evidence tending to show that the fire was set by sparks emitted from the locomotive in question, or that it was sending out sparks, cinders, or great volumes of smoke on that day, or that it or any other engine had ever done so in that vicinity, or that the track at that place was up grade, the freight train long or heavily loaded, or that the engine was working hard, or that it was faulty in construction, defective in appliances for arresting sparks, or carelessly or negligently operated, or any other facts from which an inference might be deduced that the fire which caused the injury originated from a spark or cinder emitted from the locomotive attached to the freight train, the judgment of nonsuit was properly rendered; while counsel for plaintiffs maintain that, having given evidence tending to prove that the defendant negligently permitted dry grass and other inflammable material to accumulate on the right of way, which were ignited immediately after the train passed their premises, and also that the fire which destroyed their property could not probably have originated from any other source, they have raised such an inference that the fire was caused by a spark emitted from the locomotive as to impose on the defendant the burden of proving that the engine in use on that day was properly constructed, possessed proper and modern appliances for confining sparks and cinders, and was carefully operated by skilled and prudent employees, and hence a judgment of nonsuit could not be predicated upon this ground. Reviewing the evidence offered on this branch of the subject, it

tends to show that the witness Gates first saw the freight train that morning at a point about one hundred and fifty or two hundred yards west of where the fire thereafter started; that he also saw the section men going west on a hand-car, which they removed from the track to permit the train to pass, after which they replaced the car, and resumed their journey; that just after the train passed, and while it was still in view of this witness, and within five minutes after the section men passed the point where the fire appeared, he discovered the fire; and that, in his opinion, and to the best of his knowledge, it started on the right of way. He also says that the weather was dry, that defendant had permitted dry grass to accumulate on the right of way, and that there had been no other fire in that vicinity that fall. The witness Ferguson says that from his place, which is about two miles west of where the fire started, he had a fair view of the railway track, and on that morning saw the train, which at that time of the year he generally watched pretty close; that he did not see it set any fire, and thought he was free therefrom at that time, but that in a little while after it passed he saw smoke arising at a point which appeared to him to be right at the railroad where it passes through plaintiffs' premises, and he then thought it might have been caused by men at work burning ties. The witness Van Gates, plaintiffs' superintendent, also says that defendant's employees dumped off grass and weeds about four or five feet from the ends of the ties along the railway track across the premises in question.

From this resume of the evidence applicable to the

question involved, can it be fairly said that it was sufficient to raise an inference from which the jury might reasonably find that the fire originated from a spark emitted from a locomotive attached to the freight train? "The doctrine," says SHERWOOD, J., "is now very well settled, and we think correctly, that a railroad company must keep its right of way reasonably clear of dangerous combustible matter; and if a fire occurs in consequence of a negligent failure so to do, and damages therefrom ensue to the property of another, the company will be liable therefor." *Jones v. Mich. Cent. R. R. Co.*, 59 Mich. 437 (26 N. W. 662); citing a long list of authorities. See, also, 8 Am. & Eng. Enc. Law (1st ed.), p. 14, in which a contributor, announcing the reason for this rule, says: "The general rule is that a railway company must keep its track and right of way clear of all such substances as are liable to be ignited by sparks or cinders from its engines. This is a duty clearly implied in the grant or charter which confers the right to use steam engines. As fire is a dangerous agent, it is but reasonable to presume that the legislature, in making the grant, annexed the implied condition that the track and right of way shall be kept in such a condition as to avoid danger from fire spreading therefrom." It might seem, from a casual examination of the language here quoted, that if a railway company permitted inflammable material to accumulate on its track and right of way, and by any means fire was communicated thereto, which, spreading to, destroyed the property of another, liability would thereby attach; but such, upon principle, cannot be the case, for

this implied condition annexed to the grant is to keep the track and right of way in such a condition as to be reasonably free from danger by fire incident to the passage of locomotives and trains. If a railroad company, not using its line of railway, were to permit dry grass or shavings to accumulate on the track and right of way, and such material should be set on fire by any means by another, it would certainly not be contended that the railroad company would be liable for any damages that might result therefrom. So, too, if the railroad track, with inflammable material allowed to accumulate thereon, were in constant use by the company in the operation of its trains, and some evil-disposed person were to apply a lighted match to such material, or if the same were struck by lightning, whereby it became ignited, and injury resulted, the railroad company would not be liable therefor. The use of steam as a motive power renders a fire in the locomotive a necessity, and it is against this agent, when so confined and used, that the company operating the engine must carefully guard; and to render it liable for negligence in this respect it must appear, either directly or by necessary inference, that the fire doing the injury complained of emanated from the receptacle in which the legislative grant permits it to be transported. "A railway company," says STAPLES, J., in *Richmond Railroad Company v. Medley*, 75 Va. 499 (40 Am. Rep. 734), "may be supplied with the best engines and the most approved apparatus for preventing the emission of sparks, operated by the most skillful engineers; it may do all that skill and science can suggest in the management of its locomo-

tives; and still it may be guilty of gross negligence in allowing the accumulation of dangerous combustible matter along its track, easily to be ignited by its furnaces, and thence communicated to the property of adjacent proprietors. Conceding that a railroad company is relieved of all responsibility for fires unavoidably caused by its locomotives, it does not follow that it is exempt from liability for such as are the result of its negligence or mismanagement. The removal of inflammable matter from the line of the railroad track is quite as much a means of preventing fires to adjoining lands as the employment of the most approved and best-constructed machinery." When it appears in evidence that damages have resulted from a fire caused by sparks or cinders emitted from a locomotive, a presumption of negligence in the construction and management of such engine is thereby created which it is incumbent upon the railroad company to overcome, and it may ordinarily escape responsibility by showing that the engine which was the primary cause of the injury was properly constructed, had the most approved appliances for arresting sparks and cinders, and was carefully operated by skillful and competent employees: *Koontz v. Oregon Railway & Navigation Company*, 20 Or. 3 (23 Pac. 820). The rule to be extracted from the Virginia case, however, would seem to be that, if the evidence conclusively shows sparks or cinders to have been emitted from a locomotive, thereby igniting inflammable material negligently permitted by the railroad company to accumulate on its track and right of way, and, spreading therefrom, to have destroyed the property of an-

other, the railroad company would be liable for the damage resulting, which it could not evade by showing that the engine distributing the fire was faultless in construction, perfect in appliances for arresting sparks, and skillfully and carefully operated: *Indiana Railway Company v. Overman*, 110 Ind. 539 (10 N. E. 575); *Gibbons v. Wisconsin Railroad Company*, 66 Wis. 161 (28 N. W. 170). Such a rule would seem just in its application, for it might reasonably be expected that sparks or cinders would be emitted from a locomotive, notwithstanding every precaution against their escape has seemingly been taken, and, when falling upon inflammable material negligently permitted by a railroad company to accumulate on its track or right of way, would thereby ignite, and the fire spreading, would destroy the property of another. In such case the secondary, perhaps, but the real, cause of the injury, would be the negligence of the company in permitting the accumulation of such material, in view of which the character of the engine, its appliances and operation must necessarily become immaterial factors in avoiding liability resulting from the destruction of property which might have been prevented by the exercise of greater care in the removal of such dangerous material.

In the case at bar the evidence tends to show that the fire started on the right of way, or at least the witness Gates so thought from his point of observation, about three quarters of a mile distant; but that it was caused by a spark or cinder emitted from the engine is inferable only from the mere fact that a train passed the point where the fire originated a few minutes be-

fore it was discovered. The evidence also tends to show that soil of the character destroyed had been known to retain fire for months after being ignited; but it also appears that there had been no fire, prior to the one in question, in this immediate vicinity that fall, so that the inference that the fire might have originated from smoldering embers is rebutted. It is generally known that sparks and cinders escape from engines and cause fires which destroy property, and, this being so, the probability of danger from this cause must necessarily be in inverse ratio to the remoteness from the railway track, in view of which we think an inference is reasonably deducible that a fire occurring immediately after the passage of a train, and discovered in combustible material negligently permitted to accumulate on the track or right of way, originated from a spark emitted from the engine, and particularly so when other evidence has been introduced tending to rebut any inferences that it might have arisen from other causes, thereby imposing upon the railroad company negligently permitting the accumulation of material which has given rise to the fire the burden of dispelling such inference by raising a counter inference that the fire could not reasonably have been started in this manner by showing that the track at that point was level, that the engine was properly constructed, possessed suitable appliances for arresting sparks and cinders, was operated by skillful, careful, and competent employees, and that it was not laboring to start the train to which it was attached or to stop it after being set in motion; thus leaving the question to the jury to ascertain the

fact from an examination and consideration of all the evidence whether or not the fire causing the injury originated from a spark or ciuder emitted from the locomotive. Such a rule, it would seem upon principle, ought to be enforced, for, having been negligent in permitting the accumulation of dry grass and other inflammable material at exposed places, it is reasonable to infer from the fact that the fire was started therein that it was caused by a spark given off by the engine; and as the means of dispelling the inference is entirely in the power of the railway company, the person sustaining the injury cannot be expected to know, much less to prove, that the engine was defective in its appliances or construction, or that it was negligently operated on the occasion of the fire, in view of which, to compel him to establish these facts would, in many instances, be equivalent to a denial of justice: 1 Thompson on Negligence, 153, subdivision 3. In case, however, a fire starts beyond, or even on, the right of way, if no inflammable material is permitted to accumulate thereon, and loss of property result to another therefrom, the person sustaining the damages ought to be obliged to give evidence of such facts, in addition to the discovery of the fire soon after the passage of a train, as would tend to raise an inference that the fire was caused by carelessness, either in the construction or operation of the engine, before the railroad company should be required to rebut such inference, because it might reasonably have been expected that fires will occur as an incident to the operation of trains by steam as a motive power; but where the inflammable material negligently permitted

to accumulate on the track or right of way is ignited, and the fire is discovered soon after the passage of a train, the duty should be imposed on a railroad company, after the proof of this fact, and the introduction, if possible, of evidence tending to show that the fire could not reasonably have occurred from other causes, to rebut the inference of carelessness arising from proof of the fire, because it could not have been reasonably supposed that such material would have been allowed to accumulate. The plaintiffs in this case gave evidence tending to show that the fire did not arise from smoldering embers in the soil, and, having also shown that it probably started on the right of way, in combustible material, they made such a case as to raise an inference that it was caused by a spark emitted from the engine, to dispel which the duty was imposed upon the defendant to show that the engine was properly constructed, and carefully operated; and, this being so, the judgment of nonsuit cannot be predicated on that ground, and hence it follows that the judgment is reversed, and the cause remanded for retrial.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

KOSHLAND v. FIRE ASSOCIATION.

(49 Pac. 865.)

31	362
31	403
31	362
38	476
31	362
40	410

1. **INSURANCE—NEW INCUMBRANCE.**—An insurance policy the terms of which provide that it shall be void "if the hazard be increased" is not forfeited where a mortgage is given in lieu of and for the purpose of discharging incumbrances on the property which the insurance company was informed of at the time the insurance was effected: *Koshland v. Home Insurance Company*, 31 Or. 321, applied.

2. AMENDMENT AFTER MOTION FOR NONSUIT.—Permitting an amendment of a complaint by alleging an insurable interest in plaintiff's assignor at the time of a loss is not affecting any substantial right of the plaintiff in an action on a fire insurance policy, but is clearly a wise exercise of judicial discretion in the matter of amendments. Under section 101, Hill's Ann. Laws, such an amendment may properly be made after a motion for a nonsuit.

From Umatilla: ROBERT EAKIN, Judge.

Action by Marcus S. Koshland against the Fire Association of Philadelphia. From a judgment for plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Chamberlain & Thomas*, with an oral argument by *Mr. George E. Chamberlain*.

For respondent there was a brief and an oral argument by *Messrs. John J. Balleray and Chas. H. Carter*.

MR. JUSTICE BEAN delivered the opinion of the court.

1. This is an action to recover \$1,000 on an insurance policy issued by the defendant to one Charles Cunningham, covering certain buildings and personal property which were destroyed by the fire referred to in the case of *Koshland v. Home Ins. Co.* 31 Or. 321 (49 Pac. 864), and by Cunningham assigned to the plaintiff after loss. So far as necessary to a correct understanding of the principal question to be determined on the appeal in this case, it is sufficient to say that the defense interposed is that the insured violated a condition in the policy which provides that it shall be void, unless otherwise provided by agreement in-

dorsed thereon or added thereto, "if the hazard be increased by any means within the control or knowledge of the insured, or if the subject of the insurance be personal property, and be and become incumbered by chattel mortgage, or if any change other than by the death of an insured take place in the interest, title, or possession of the subject of insurance, whether by legal process of judgment, or by voluntary act of the insured, or otherwise." The particular violation of this condition relied upon and alleged as a defense to this action is that on June 4, 1895, Cunningham, without the knowledge or consent of the defendant company, executed to the plaintiff a mortgage on the real estate upon which the buildings destroyed by fire and covered by the policy were situated, to secure the payment of \$28,000; and the defendant claims that the court erred in refusing to submit to the jury as a question of fact whether the hazard was increased by reason of this mortgage. There is very respectable authority for holding that the creation of incumbrances, whether voluntary, as in case of mortgages, or involuntary, as in case of tax liens, is not to be considered a violation of a condition in an insurance policy like the one quoted. See Richards on Insurance, §§ 141, 145, 147, and authorities there cited. But, however this may be, it appears in this case that the mortgage in question was given in lieu of, and for the purpose of discharging, incumbrances on the property of which defendant had full knowledge at the time the insurance was effected; and the question presented therefore bears so close a resemblance to the one before us in *Koshland v. Home Ins. Co.*,

supra, that it is not necessary to do more than refer to the opinion in that case as authority for the ruling here. If a mortgage of the character indicated is not a violation of a condition in an insurance policy against incumbrances because it does not increase the risk, as was held in the case referred to, it clearly does not violate the terms of the policy now in hand on the ground that it increased the hazard, and the court committed no error in ruling that its execution was no defense to this action.

2. The only other assignment of error discussed in the brief is based on the ruling of the court in permitting the plaintiff to amend his complaint by alleging an insurable interest in Cunningham at the time of the loss, and to call witnesses to prove such interest after the defendant had moved for nonsuit for want of the allegation so permitted. But this amendment was not only manifestly in the furtherance of justice, but was one which the trial court had the undoubted power to grant, under section 101 of the Code. It did not change the cause of action attempted to be set up in the complaint, nor did it affect any substantial right of the defendant, but simply supplied an omission which, through inadvertence, had been overlooked until attention was called thereto by the defendant's motion for nonsuit. It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

[Decided at PORTLAND July 31, 1897.]

CARNAGIE v. DIVEN.

(49 Pac. 881.)

31	368
37	445
81	866
842	297
31	368
148	459
148	466

EQUITY—SETTING ASIDE CONVEYANCE.—Neither a grantor nor his heirs can impeach a conveyance as voluntary unless at the time the conveyance was executed the grantor was in such a state of mental weakness as to be incapable of fully understanding the nature and effect of the transaction.

INFERENCE OF MENTAL INCAPACITY.—It cannot be inferred from the fact of extreme old age that a grantor was mentally incapacitated to execute a conveyance: *Chrisman v. Chrisman*, 16 Or. 127, cited.

PLEADING.—In a suit brought by heirs to set aside a conveyance of real property made by decedent the day before his death, an allegation in the complaint of decedent's mental incapacity to convey "prior to the time of his death" and "immediately before such time" is not a sufficient averment to show his incapacity at the time the deed was executed.

From Baker: ROBERT EAKIN, Judge.

Suit by George M. Carnagie and others against Ambrose P. Diven and others to set aside a conveyance. Plaintiffs appeal from a decree against them.

AFFIRMED.

For appellants there was a brief over the names of *John Bruce Messick* and *Hyde & Packwood*, with an oral argument by *Mr. Messick*.

For respondents there was a brief and an oral argument by *Mr. Frank L. Moore*.

Opinion by MR. CHIEF JUSTICE MOORE.

This is a suit by the heirs of John Campbell to set aside a conveyance executed by him to the defendant

Ambrose P. Diven. The plaintiffs allege that on October 22, 1892, Campbell was the owner in fee of three hundred and twenty acres of land in Baker County, of the value of \$4,500, which on that day, for the expressed consideration of said sum, he purported to convey to Diven; that on the next day Campbell suddenly died intestate, at the age of eighty-three years, leaving in said county an estate which has been duly administered upon, the debts fully paid, and the administrator discharged; "that prior to the time of his death, and immediately before said time, the said John Campbell was very feeble in body and mind, occasioned by his extreme old age, and entirely unable to intelligently contract or perform any business; that Diven and his wife, well knowing Campbell's infirmities and his consequent inability to enter into a contract or transact any business, took advantage of their knowledge and his enfeebled condition, and by falsely representing that they would care for and support him during his lifetime, pay him the sum of \$2,500, and build on said real property a comfortable dwelling house, to cost not less than \$1,200, induced him to execute the deed in question, but neither Diven and his wife intended to keep or perform any of said promises or representations, nor did they intend to pay Campbell at any time, nor have they ever paid any one, any consideration whatever for said real property." The plaintiffs show their right to inherit the decedent's property if no conveyance thereof had been made, and pray for the relief hereinbefore stated. The court having sustained a demurrer to the complaint on the ground that it did not state facts suffi-

cient to constitute a cause of suit, the plaintiffs refused to plead further, whereupon the suit was dismissed, and plaintiffs appeal.

The important question raised by the demurrer is whether the complaint states sufficient facts to entitle the plaintiffs to the relief demanded. Every person of lawful age who is seised of real property in this state may dispose of his interest therein agreeably to his wishes, and, in the exercise of this right, may make a voluntary conveyance thereof binding upon the parties thereto: *Bradtfeldt v. Cooke*, 27 Or. 194 (50 Am. St. Rep. 701, 40 Pac. 1). And, while his creditors, acting on the theory that the debtor should be just before he is generous, may have such conveyance set aside as being in fraud of their rights, and thereupon have the property affected thereby applied to the satisfaction of their liens upon it, neither the grantor nor his heirs will be permitted to impeach the transfer unless it appears to the satisfaction of a court of equity that at the time the conveyance was executed the grantor was laboring under such a state of mental weakness or exaltation as to be incapable of fully understanding the nature and effect of the transaction: *Allore v. Jewell*, 94 U. S. 506; *Griffith v. Godey*, 113 U. S. 89 (5 Sup. Ct. 383); *Jackson v. King*, 15 Am. Dec. 354; *Dennett v. Dennett*, 84 Am. Dec. 97. It has been held by this court that, where the consideration paid for land was grossly inadequate, equity would afford relief and set aside the conveyance when it satisfactorily appeared that the grantor at the time the deed was executed was of such weak understanding as to be incompetent to transact business: *Scovill v. Barney*, 4

Or. 288; *Archer v. Lapp*, 12 Or. 196 (6 Pac. 672). The plaintiffs having alleged that the grantee never paid or intended to pay any consideration whatever for the land in question, it was not incumbent upon them, as a condition precedent to the right of cancellation of the deed, to aver a tender of, or a readiness to repay, the purchase price; and hence the sufficiency of the complaint must be measured by the allegation of Campbell's mental infirmity at the time the conveyance was executed. Capacity to convey real property must be equivalent to ability to devise the same, in which case the state of the testator's mind is determined by its condition at the time the instrument was executed: *Clark's Heirs v. Ellis*, 9 Or. 128. "For the sole question," says WILLIAMS, J., in *Kinne v. Kinne*, 9 Conn. 102, "is, what was his state of mind at that time? Had he then an understanding of the nature of the business he engaged in, a recollection of the property he meant to dispose of, and of the persons to whom he meant to convey it, and the manner in which he meant to distribute it between them?" In *Chrisman v. Chrisman*, 16 Or. 127 (18 Pac. 6), it was held that neither old age, sickness, nor extreme distress or debility of body incapacitates, provided the testator has possession of his mental faculties and understands the business in which he is engaged. It is nowhere alleged in the complaint that Campbell had been adjudged insane prior to the execution of said deed, so that the condition of his mind would be presumed to continue, and his lack of power to execute a conveyance cannot be inferred from his extreme age. It was incumbent upon the plaintiffs to prove

at the trial the state of his mind at the time the deed was executed, and, if they would avoid its effect, they should have alleged that he was incapacitated at that time. An examination of this allegation as above quoted will show that there is an entire failure in this respect. "That prior to the time of his death" may mean some time anterior to the execution of the deed, "and immediately before said time" may also mean at any time subsequent to the conveyance; so that the averment may be strictly true, and still the grantor may have been in the full possession of his mental powers at the time the deed was executed. The complaint, being defective in this regard, failed to state facts sufficient to constitute a cause of suit; and, this being so, the court committed no error in sustaining the demurrer, and hence the decree is affirmed.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

STATE EX REL. v. GRANT.

(49 Pac. 855.)

CITY TREASURER—PARTIAL PAYMENT ON WARRANTS.—Under charter provisions requiring the city treasurer to receive and safely keep all moneys of the city coming into his hands, and pay the same out on warrants and orders signed by the mayor and recorder, it is not his duty, and he therefore cannot be compelled, to make a partial payment on a warrant, though he is directed to do so by the city council.

From Union: ROBERT EAKIN, Judge.

Application by J. W. Scriber for mandamus to William Grant treasurer of the City of LaGrande. Peremptory writ denied. Relator appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Willard W. Hindman* and *J. D. Slater*.

For respondent there was a brief and an oral argument by *Mr. Chas. H. Finn*.

Opinion by MR. JUSTICE BEAN.

This is a proceeding by mandamus to compel the defendant, as treasurer of the City of La Grande, to apply, in part payment of a city warrant belonging to the relator, certain funds in the city treasury applicable to the payment of such warrant, but which are insufficient to pay it in full. Prior to the commencement of this proceeding the common council of the city, by resolution, instructed the treasurer, "as fast as funds accumulated on hand to the amount of one hundred dollars, to apply the same on this warrant, and to take a receipt, as well as to indorse the same on the back thereof," which he refused to do, or to make any payments whatever on the warrant, for the reason that he did not have sufficient funds on hand with which to pay it in full. The question to be determined on this appeal, therefore, is whether, under the rules of law, or the resolution of the council referred to, the city treasurer can be compelled by mandamus to make a partial payment on an outstanding city warrant without its delivery to him, or being furnished with other evidence of or voucher for such payment than the receipt of the holder of the warrant. That mandamus will lie to compel a public disbursing officer to pay a warrant lawfully issued upon accounts which have been regularly allowed by the

proper officer or tribunal, when there is money in the treasury for that purpose, is unquestioned: Merrill on Mandamus, § 135. But in our opinion the fact that there were not sufficient funds on hand at the time the application for the writ in this case was made to pay the warrant in full affords an insuperable objection to granting the relief demanded. By the charter of the City of La Grande, the treasurer is required to receive and safely keep all moneys that shall come into his hands belonging to the city, and pay the same out upon warrants or orders signed by the mayor and recorder: Laws 1885, p. 374. Under this provision of the charter, he is authorized to pay out the public funds belonging to the city only on an order or warrant signed in the manner provided. In other words, such warrants or orders are made by the city charter the evidence to him of the allowance of the claim by the proper tribunal, and his voucher for its payment. This being so, it seems to us clear that he cannot be compelled to pay a warrant, or any part of it, unless it is delivered to him as an evidence of such payment. He is only entitled to credit for payments made upon orders or warrants properly signed, and the evidence of such payment is the warrant itself, and therefore he is entitled to its possession when paid. If we are right in this view of the treasurer's duty under the charter, it is manifest that this proceeding will not lie. Mandamus lies only to give effect to a clear legal right, and will not be awarded to compel a public officer to do any act which he is not authorized to do by law. Its office is to compel the discharge of a duty already devolved upon him, and

not to create new ones. When, therefore, it appears in a proceeding against a city treasurer to compel him to pay a warrant that there is not sufficient money in his hands out of which to satisfy it in full, the writ will be denied, because he is not derelict in his duty: *Mechem on Public Officers*, § 950; *Merrill on Mandamus*, § 135; *High on Extraordinary Legal Remedies*, § 352. Nor did the resolution of the city council instructing defendant in this case to make partial payments on the warrant in question in any way change the rule or affect the remedy. His duty in the matter of disbursing the public funds is prescribed by the charter, and he cannot be compelled by order of the council to pay them out in any other manner. It follows that the judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

[Decided at PENDLETON July 31, 1897.]

STRICKLAND v. GEIDE.

(49 Pac. 982.)

REPEAL BY IMPLICATION—FENCE STATUTES.—The act of 1872, relating to trespass by horses and cattle and to fencing lands in Umatilla and Wasco counties (which, as amended, now constitutes Hill's Ann. Laws, §§ 3452-3455), is a complete substitute for the prior act of 1870, on the same subject (which, as amended, is now known as Hill's Ann. Laws, §§ 3445-3451) as to the territory then comprised within Wasco County. The common law on the subject of trespass by stock, except as to horses and cattle, is now in force in that district, within which is Gilliam County.

TRESPASS BY SHEEP.—The act of 1872 (Hill's Ann. Laws, §§ 3452-3455), as applied to sheep within what was then Wasco County, entirely superseded the act of 1870 (Hill's Ann. Laws, §§ 3445-3451), and it is, therefore, not now necessary to show the existence of a lawful inclosure before damages can be recovered for trespass by sheep: *French v. Crenwell*, 13 Or. 418, and *Bileu v. Paisley*, 18 Or. 47, followed.

31	373
35	401
31	373
39	536
31	373
45	107
31	373
46	332

From Gilliam: W. L. BRADSHAW, Judge.

AFFIRMED.

For respondent there was a brief over the names of *Carey & Mays, L. W. Darling, and H. H. & H. B. Hendricks*, with an oral argument by *Mr. Franklin Pierce Mays*.

This is an action of trespass, wherein it is alleged that defendants unlawfully and willfully permitted their band of sheep to be herded, and unlawfully and willfully did herd said band, upon the premises and lands of plaintiff. The action was commenced in the justice's court, and upon appeal to the circuit court, and trial there, judgment was rendered in favor of plaintiff, from which the defendants appeal to this court.

Upon the threshold of our inquiry touching the errors assigned, it becomes pertinent to determine the

effect of certain statutes heretofore enacted relating to stock and fencing in respect of Gilliam County, from which the action emanates. In 1870 the legislature passed an act regulating fencing and inclosures, and providing a remedy against stock breaking into such inclosures, but excluded Umatilla County from its operation. For the first trespass the owner is required to make reparation to the party injured for the true value of the damages sustained; and for every trespass thereafter double damages are recoverable before any court having cognizance; and for a third offense, from any animals breaking into such inclosures, the animals themselves may be taken into custody and kept at the expense of the owner until the damages are repaired. In October, 1872, the legislature passed an act entitled "An Act in Relation to Trespass by Cattle, and Regulating Fences in the Counties of Umatilla and Wasco, in the State of Oregon." The first section provides that "no action shall be maintained for damages done by any horse, mare, gelding, mule, ass, jenny, foal, bull, stag, cow, ox, steer, heifer or calf, upon the premises of another, unless the person seeking such damage shall allege and prove upon the trial thereof that said premises were, at the time of the commission of said damage, inclosed with a lawful fence." Section 2 provides what manner of fence shall be deemed lawful, and section 3 gives the remedy. Any party injured by reason of any such stock trespassing upon premises or lands so inclosed may recover damages for such injury before any court having jurisdiction, and the animals trespassing may be at once taken and held as security for the payment of

the damages and costs, provided that the person so holding such animals shall within three days notify the owner thereof in the manner prescribed. The question here is, how do these acts affect Gilliam County, which has since been created out of Wasco County, as it pertains to sheep? There is no doubt but that the act of 1870 applied to the territory comprising the County of Gilliam, and that sheep came within the purview of the act, so that it was necessary to fence against them, as well as other stock, if damages for trespass were to be insisted upon: *Campbell v. Bridwell*, 5 Or. 311. Now, it is contended by plaintiff that the act of 1872 repealed the act of 1870, in so far as it pertains to sheep within Wasco County, out of which Gilliam was since carved, and therefore that it is not necessary to show the existence of a lawful inclosure before damages can be recovered for trespass by this species of stock. The defendant combats this contention, and holds that such is not the effect of the act of 1872.

It is a rule of law sanctioned by this court that whenever two acts are repugnant, one inimical to the other, so that both cannot stand, the later will operate as a repeal of the earlier by implication, without any express words of repeal; and such will be the effect, even when they are not repugnant in all their provisions, if the new statute revises the subject-matter of the old, and is plainly intended as a substitute for the old in toto: *Continental Insurance Company v. Rigger*, 31 Or. 336 (48 Pac. 476), and *Little v. Cogswell*, 20 Or. 345 (25 Pac. 727). Such rule is not inimical to the doctrine that repeals by implication

are never favored, nor to that which gives effect to several statutes upon the same subject whenever it is possible to do so; and it is firmly established elsewhere: *Dexter Road Company v. Allen*, 16 Barb. 15; *Roche v. Mayor, etc.* 40 N. J. Law, 257; *Daviess v. Fairbairn*, 3 How. 636; *Murdock v. City of Memphis*, 87 U. S. (20 Wall.), 590; *Swann v. Buck*, 40 Miss. 268; *City of Sacramento v. Bird*, 15 Cal. 294; and Endlich's Interpretation of Statutes, §§ 200, 205.

Manifestly, it was the intention of the legislature, by the act of 1872, to provide a substitute in toto for the former act, and to prescribe the only regulations requisite to be observed in the construction of fences within the territory then comprised by Wasco County. The act specifies with much particularity how the different kinds of fences shall be constructed, and provides that no action shall be maintained for trespass by horses and cattle unless it shall be made to appear that the premises so damaged were inclosed with a lawful fence; and it is certain that the legislature contemplated no such absurdity as that a person residing in the county should build two kinds of fences in order to protect his inclosures from trespass by all kinds of stock, or that there should be one remedy for trespass by sheep and swine upon lands inclosed by one kind of fence, and another covering damages for trespass by cattle and horses upon lands inclosed by another kind of fence. It was contemplated, undoubtedly, that the act of 1872 should be the only legislative enactment touching or regulating the subject-matter thereof as it applied to that county, and this would leave the matter, as it pertains to stock

other than cattle and horses, to rest where it did prior to any enactment upon the subject. That such is the proper inference of legislative intendment is in some way corroborated by the fact that both Umatilla and Wasco counties are within the purview of the act, and, while the former fence law applied to Wasco, it did not apply to Umatilla, and it was probably contemplated that a law identical in its effect should apply to each of said counties. This interpretation seems to have been adopted in *Bileu v. Paisley*, 18 Or. 47 (4 L. R. A. 840, 21 Pac. 934). Such being the state of the law, we must turn to the common law to determine whether plaintiff has a remedy upon the complaint filed, and this question has been decided favorably to the plaintiff in *French v. Cresswell*, 13 Or. 418 (11 Pac. 62), upon a complaint identical in form, and reaffirmed in principle in *Bileu v. Paisley*, *supra*; and while, if this latter question was a matter of first impression, our decision might be different, we feel constrained to treat it now as *stare decisis*.

Another question is made upon the record touching the admission of certain testimony relating to the value of the lands before and after the trespass, in order to determine the amount of damages, the plaintiff testifying that they were worth \$2,000 before and \$1,500 after, and, therefore, that he was damaged in the sum of \$500; but, whether the admission of this testimony was error or not, it is manifest that defendants were not materially damaged by it, the verdict being for \$25 only. In support of this view, see *French v. Cresswell*, *supra*.

AFFIRMED.

[Decided August 9, 1897.]

SHATTUCK v. KINCAID.

(49 Pac. 758.)

31	379
31	446
31	479
31	379
44	383
31	379
46	561

APPROPRIATION DEFINED.—An “appropriation” is a setting aside or designation of particular funds for the discharge of certain definite and specified obligations, and may relate to a fixed amount of liability or to one that is continuing.

APPROPRIATION FOR PAYMENT OF STATE OFFICERS.—A statute fixing the amount of the salary of a public official and prescribing the time and manner of payment does not constitute a continuing appropriation for the discharge of such obligation, under a constitutional provision that “no money shall be drawn from the treasury but in pursuance of appropriations made by law,” in view of contemporaneous legislative construction of the statute to that effect.

LEGISLATIVE CONSTRUCTION.—Where a statute has for many years and from almost the date of its enactment, been construed by successive legislatures in a particular manner not inconsistent with the language used, the courts will hesitate to adopt a different construction.

DUTY OF SECRETARY OF STATE TO AUDIT CLAIMS.—When a claim against the state is presented to the secretary he must pass upon it by either rejection or approval without regard to whether the legislature has or has not appropriated money to meet it, and, if he allow the claim, he must indorse upon it the amount so allowed, and the name of the particular original fund from which it is to be paid, and draw his warrant on the state treasury therefor: *Brown v. Fleischer*, 4 Or. 132, overruled.

MEANING OF WORD “FUND” IN SECTION 2208, HILL’S ANN. LAWS.—The word “fund” as used in section 2208 of Hill’s Ann. Laws means one of the original funds subsisting by law.

EFFECT OF DRAWING WARRANTS—AUDITING CLAIMS.—The drawing of a warrant on the state treasury is, under the present statutes, a part of the act of auditing, and is not a drawing of money from such treasury.

WARRANT AS EVIDENCE OF CLAIM.—A warrant is only *prima facie* evidence of the validity of a claim against a municipality or commonwealth: *Goldsmith v. Baker City*, 31 Or. 249, and *Frankl v. Bailey*, 31 Or. 288, approved.

REFUSAL OF TREASURER TO PAY WARRANT.—Since a warrant is not conclusive evidence of an indebtedness it is the duty of the state treasurer to refuse payment unless it represents a claim authorized by law: *School District v. Lambert*, 28 Or. at page 224, and *Goldsmith v. Baker City*, 31 Or. at page 252, approved.

SPECIAL APPROPRIATION.—The expression "where provisions for the payment thereof shall have been made by law," used in section 2230, Hill's Ann. Laws, refers to only those obligations incurred by the state under some previous authority, and does not include special appropriations made for particular purposes by acts which within themselves authorize the incurring of the expense.

MANDAMUS.—Mandamus will lie to compel the performance of the duty of auditing a claim for services to the state, where, as in the case of salaries of public officers, the nature and amount of the services rendered are definitely fixed and ascertained, and the compensation therefor is regulated by law, since in such case the duty is merely ministerial.

From Marion: HENRY H. HEWITT, Judge.

E. D. Shattuck instituted a mandamus proceeding against Harrison R. Kincaid, as Secretary of State of Oregon, to compel him to audit a claim against the state and to issue a warrant upon the state treasurer for the amount he allowed thereon. The claim was for that portion of his salary as judge of the circuit court for the fourth judicial district of said state due for the quarter ending March 31, 1897, amounting to \$750.00. The claim was properly stated, certified, and verified, as by law required, and presented to the secretary with a demand that he pass upon it and draw a warrant on the state treasurer therefor, but he refused entirely to consider the claim for the reason that the legislature failed to organize in 1897, and, therefore, no appropriations were made, contending that the authority to audit accounts is dependent upon an appropriation having previously been made by the legislature for their payment. A demurrer to the alternative writ was sustained, and judgment entered for the defendant, whereupon plaintiff appealed.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Ralph E. Moody*.

For respondent there was a brief and an oral argument by *Messrs. N. B. Knight and A. C. Woodcock*, to this effect:

The secretary of state is, by virtue of his office, auditor of public accounts: Const., Or., art. VI, sec. 2.

It is the duty of the legislature to provide for raising revenue sufficient to defray the expenses of the state for each fiscal year: Const., Or., art. IV, sec. 2.

No money can be drawn from the treasury except in pursuance of appropriations made by law: Const., Or., art. IV, sec. 4.

The secretary of state has no authority to audit any claim and draw any warrant upon the state treasurer for the same in the absence of an appropriation made by the legislature for its payment: Hill's Ann. Laws, § 2208, subd. 7; Const., Or., art. IV, sec. 4; *Brown v. Fleischner*, 4 Or. 132; *Reesdale v. Walker*, 52 U. S. (11 How.), 271; *Moses v. Jumel*, 31 La. Ann. 142; *Stratton v. Green*, 45 Cal. 149; *State v. Kinney*, 9 Mont. 389.

In the payment of claims the law makes no distinction whether the amount is fixed by law or not: Const., Or., art. IX, sec. 7; *Myers v. English*, 9 Cal. 341; *State v. Leidtke*, 9 Neb. 468; *Ristine v. State*, 20 Ind. 338.

The secretary of state is the financial agent of the state, and the limitations upon the authority of the state treasurer under the constitution and laws apply also to the secretary in his management of the fiscal concerns of the state: Const., Or., art. VI, sec. 2; Hill's Ann. Laws, § 2208; *State v. Walliets*, 12 Neb. 409.

The warrant of the secretary is merely an order upon the treasurer for the present payment of a certain claim out of a particular fund in the treasury previously set apart and appropriated for that purpose: Hill's Ann. Laws, § 2208, subds. 7, 8; *State v. Lindsley*, 27 Pac. 1019.

Opinion by MR. JUSTICE WOLVERTON.

This is a proceeding by mandamus to require the secretary of state to audit a claim, and draw his warrant for the salary of a circuit judge for the quarter ending March 31, 1897. The secretary resists the proceeding upon the ground that, the legislature having failed to make appropriations for the current expenses of the state, he is without authority either to audit or draw his warrant for such claim. The case comes here upon demurrer to the alternative writ, which was sustained by the lower court.

By section 2297, Hill's Ann. Laws, it is provided that "each of the judges of the circuit courts in this state (shall) receive an annual salary of three thousand dollars, payable quarterly, and no other allowance for their services, either directly or indirectly," and by section 2230 that "the salaries of the governor, secretary of state, and other officers of the state, shall be paid quarterly, out of the treasury of this state, upon the warrant of the secretary of state, commencing from and after they enter upon the duties of their respective offices." These sections clearly establish the plaintiff's right to the quarter's salary claimed, and upon this point there is no contention.

Article IX, section 4 of the state constitution provides that "no money shall be drawn from the treasury but in pursuance of appropriations made by law," and article VI, section 2, constitutes the secretary of state the auditor of public accounts.

Section 2230, of our statutes, was section 4 of an act approved June 2, 1859, and by the same act it was provided, among other things, as follows:—

"Sec. 11. The secretary of state shall superintend the fiscal concerns of the state, and manage the same in the manner prescribed by law; "to keep fair, clear, distinct and separate accounts of all the funds and revenues of the state, and also of all expenditures, disbursements and investments thereof, showing the particulars of every expenditure, disbursement and investment. * * * To examine and determine the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law, and to indorse upon the same the amount due and allowed thereon, and from what fund the same is to be paid, and draw a warrant on the treasury for the same; and he shall report to the legislature at the commencement of each regular session a complete list of all accounts so audited, together with a general statement of the fiscal concerns of the state; provided, that no account shall be so audited, except the same be duly verified by the oath, affidavit or affirmation of the claimant or his agent, and all accounts shall be kept on file in his office; "to enter in a book to be kept for that purpose, an abstract of all warrants drawn on the treasury, showing the date, number, name of the claimant,

the amount claimed, the amount allowed thereon, and from which fund to be paid. * * *

Sec. 12. Whenever any account shall be presented to the secretary of state for settlement, he may require the person presenting the same, or any other person or persons, to be sworn before him touching such account, and when so sworn, to answer orally or in writing as to any facts relating to the justness of the account. If any person interested shall be dissatisfied with the decision of the secretary on any claim, account, or credit, it shall be the duty of the secretary, at the request of such person, to refer the same, with his reasons for his decision, to the legislative assembly, and all persons having claims against this state shall exhibit the same with the evidence in support thereof to the secretary to be audited, settled, and allowed within two years, and not afterward. And in all suits brought in behalf of the state, no debt or claim shall be allowed against the state as a set-off but such as have been exhibited to the secretary, and by him allowed or disallowed, except only in cases where it shall be proved to the satisfaction of the court that the defendant at the time of trial is in possession of vouchers which he could not produce to the secretary, on account of absence from the state, sickness or unavoidable accident."

Other sections of the same act provide that "the state treasurer shall keep his office at the seat of government, shall receive and have charge of all moneys paid into the state treasury, and shall pay out the same as directed by law."

"It shall be the duty of the treasurer: * * *

Second—To pay on demand out of the state treasury all sums authorized by law to be so paid, if there are appropriate funds in the treasury to pay the same, and when any such sum is required to be paid out of a particular fund it shall be paid out of such fund only; and he shall pay no fund out of the treasury except in pursuance of law authorizing the payment thereof; but when any claim or account is authorized by law to be paid out of a general or contingent appropriation, the same shall be paid by the treasurer upon the warrant of the secretary of state. Third—To pay all warrants on the treasurer in the order in which they are presented, out of the appropriate fund; if there are no such funds in the treasury, then he shall indorse on such warrants 'Not paid for want of funds,' together with the date, and all warrants so indorsed shall draw legal interest from and after such indorsement."

There is some confusion in numbering the sections of the original act, but the sections referred to are designated in Hill's Ann. Laws as sections 2208, 2209, 2217 and 2219.

The plaintiff contends, *first*, that the law fixing the amount of his salary, and providing for the manner of its payment, constitutes an appropriation of funds out of the treasury with which to meet the installments as they become due; and, *second*, that the secretary is required to audit his claim therefor, and draw a warrant for the amount found due, even though it be determined that there has been no appropriation made to meet it. The principle involved in the declaration of the fundamental law that "no money shall be drawn

from the treasury but in pursuance of appropriations made by law," had its origin with the British parliament. It had, prior to the time of Charles II, occasionally and at long intervals exercised the right of appropriating supplies to particular purposes as the needs of the government demanded, but during the reign of that monarch it employed the authority generally, although perhaps not in every instance. It was not, however, until after the revolution of 1688 that the right and authority became firmly established. The principle, as then and since understood, is "that supplies granted by parliament are only to be expended for particular objects specified by itself": Taswell-Langmead, English Constitutional History, 620, 621. The abuse which the establishment of the principle was designed to correct was the exercise of official discretion in paying out and disbursing the public funds, and its purpose was to endow the legislative body with the sole authority, and impose upon it the specific duty, of deciding how and when such funds shall be applied to the discharge of the expenses, debts, or other engagements or liabilities of the government; and such is the limitation imposed by our present constitutional provision: *Ristine v. State*, 20 Ind. 328; *State v. Burdick* (Wyo.), 33 Pac. 125; 2 Opinions of Attorneys-General, United States, 670. An "appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be," says PERKINS, J., in *Ristine v. State*, 20 Ind. 328, "an authority from the legislature, given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury in

a given year, to specified objects or demands against the state." Webster defines "appropriation" as "the act of setting apart or assigning to a particular use or person in exclusion of all others; application to a special use or purpose, as of * * * money to carry out some public object." No particular expression or set form of words is requisite or necessary to the accomplishment of the purpose, and the appropriation may be prospective as well as in præsenti; that is "it may be made in one year of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues": *Humbert v. Dunn*, 84 Cal. 57 (24 Pac. 111); *Proll v. Dunn*, 80 Cal. 220 (22 Pac. 143). And in every instance it becomes a question of legislative intent to be gathered under the settled rules of interpretation from the language employed, the context, the necessity for the enactment, and purpose to be accomplished, considered in the light of contemporaneous circumstances. FIELD, J., in *McCauley v. Brooks*, 16 Cal. 28, says: "To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury." It is maintained by some authorities that constitutional provisions fixing the salaries of state officers proprio vigore make an appropriation out of the treasury for the payment of the same as they become due, and this upon the ground that such salaries have become fixed and unchangeable by any power vested in the legislature, and that to withhold the funds neces-

sary to their payment would be subversive of the will of the people as expressed by the organic law. It is said, arguendo, that if the legislature is without power to reduce the salaries of such officers, it cannot be affirmed that it may take away the whole by withholding the funds requisite to their payment. In support of this view *Thomas v. Owens*, 4 Md. 189, decided in 1853, is perhaps the leading case. It has been followed in *State v. Hickman*, 9 Mont. 370 (23 Pac. 740), and *State v. Weston*, 4 Neb. 216, and criticised in *Myers v. English*, 9 Cal. 341. The Nebraska case, however, presents a dissimilar feature, in that the constitution provides that "the authorities shall draw warrants on the state quarterly" for the salaries fixed thereby, "which shall be paid out of any funds not otherwise appropriated." Other cases apply the principle to legislation under constitutions which provide that salaries of state officers shall neither be increased nor diminished during the terms for which they shall have been appointed or elected. It is maintained by these that the law fixing such salaries becomes immutable in so far as it may affect incumbents, and that the legislature is powerless to cut off by indirection that which it could not do by direct enactment, and hence that a statute merely fixing the amount to be received and the times of payment is, in effect, an appropriation of funds which become applicable to the discharge of their stated compensation as it becomes due. And we may say the very decided tendency of recent adjudications is in support of this advancement upon the doctrine: *State v. Burdick* (Wyo.), 33 Pac. 125; *People v. Goodykoontz*, 22 Colo. 507 (45

Pac. 414). As directly opposed to this view see *Myers v. English*, 9 Cal. 341. Yet other authorities maintain that the result of such legislation is to effectuate an appropriation, regardless of the fundamental law limiting the power of the legislature to change the amount of official salaries to times other than during incumbency, and that no annual or special appropriation is otherwise necessary to authorize the disbursement of public funds by the officers in charge in payment of such demands as they arise. See *Reynolds v. Taylor*, 43 Ala. 420, and *Carr v. State*, 127 Ind. 204 (22 Am. St. Rep. 624, 11 L. R. A. 370, 26 N. E. 778). It is difficult to understand, however, upon what principle an enactment of the nature indicated can have the effect claimed for it. The plain letter of the statute falls very far short of an express direction to that end, and the apparent object to be attained is fully accomplished when the salary and times of its payment are definitely fixed. No other or further intendment is predicated of statutes of like nature where individuals only are concerned, and a different rule ought not to prevail because the state is concerned. But we believe the weight of authority is opposed to this latter advance upon the doctrine, and that the better rule requires something more by which to indicate a legislative intendment to effectuate an appropriation.

In *Nichols v. Comptroller*, 4 Stew. & P. 154, the case upon which *Reynolds v. Taylor*, 43 Ala. 420, seems to have been based, it was determined that an act fixing a salary "payable quarter-yearly out of any money in the treasury not otherwise appropriated" made an appropriation for the purpose of meet-

ing the quarterly payments. In *Humbert v. Dunn*, 84 Cal. 57 (24 Pac. 111), the act under consideration provided that "each member [of a commission] shall receive a salary of \$2,400 payable monthly. * * * to be paid out of any money in the treasury not otherwise appropriated," and it was held that this operated as an appropriation. The statutory provisions, as indicated by these cases, are similar to the Nebraska constitutional provision above referred to. And in *Cutting v. Taylor*, 3 S. Dak. 11 (15 L. R. A. 691, 51 N. W. 949), which comes nearer the case at bar, the language employed was: "The auditor * * * shall issue and deliver to the claimant in each city, town, etc., his warrant upon the territorial treasurer for an amount equal to 2 per cent. of the premiums received upon the policies issued upon any property in any such city, town, etc., and such warrant shall be paid by the territorial treasurer upon presentation thereof." See, also, *State v. Kenney*, 10 Mont. 485 (25 Pac. 1022). From statutes of the nature indicated by these authorities the inference is natural and legitimate that it was the legislative intent not only that the amount and times of payment of the salaries should be rendered definite and certain, but that, when falling due, funds in the treasury applicable to their payment should be at all times in readiness for their prompt discharge, and hence the appropriation as a necessary result to meet the purposes of the legislation. It is one thing to fix the amount and times of payment of an officer's salary, and quite another to provide funds, and make them available at specified times, so that the state will not at any time default in its payments,

and it does not occur to us that a fixed salary with stated times for the payment of proportional installments thereof can, with any greater propriety, carry with it an appropriation of funds with which to meet the payments than where the state has become otherwise obligated under authority of law, and no appropriation has been made anticipating payment. Whatever may be the correct rule where the salary is fixed by the constitution, or where it is by that instrument rendered unchangeable during incumbency, followed by legislation simply fixing the amount and times of payment thereof, it is quite certain that, if regard be paid to the known and well-settled rules of statutory construction, the legislature has not, by the enactment of such a statute, without else, manifested an intention of setting aside funds in the treasury for its payment. Something more is needed, some setting aside of a particular fund, or designation of a fund, out of which it shall be paid, or direction to the officer in charge requiring him to make payment at particular times, or that it be paid out of the treasury. And this gets us back to the original proposition that an appropriation is the setting aside or designation by express direction or by implication of particular funds for the discharge of definite and specified obligations or liabilities, which, however, may be in contemplation, such as will arise in the future, and the appropriation may be continuing in its nature, but the legislative intent to have funds always ready and applicable to their prompt discharge at stated times works out the appropriation, and nothing short of it can have such an effect. Under the legislative direc-

tion that the salaries of all state officers "shall be paid quarterly out of the treasury of this state, upon the warrant of the secretary of state, commencing from and after they enter upon the duties of their respective offices," and under the authorities which seem pertinent to the inquiry, we would be inclined to hold that a continuing appropriation had been thus effectuated for the payment of such salaries quarterly were it not for a legislative construction of the act nearly contemporaneous with its enactment. There is some reason for believing that public funds were disbursed under this law without further direction before the meeting of the succeeding or first regular session of the state legislature which convened September 10, 1860, but at such session a general appropriation bill was passed setting aside funds for the payment of such salaries, specifying with much particularity the incumbent by his official title, and the amount for each. And every succeeding regular biennial legislative assembly since then, save in 1868 and 1897, has, in its general appropriation bills, made like specific appropriations for these salaries. So that the act of 1859 has received what may be termed a contemporaneous legislative construction, which has been acquiesced in and acted upon by that body for more than a third of a century, and we feel bound by the construction thus given the act, and therefore hold that it did not effectuate a continuous appropriation for the payment of the salaries of state officers: *Prime v. McCarthy*, 92 Iowa, 569 (61 N. W. 220).

This brings us to the second contention, touching the authority of the secretary of state to audit and

draw his warrants for the claim, and the solution of this question depends entirely upon the construction of the statute which prescribes his duties. Under the constitution he is made the auditor of public accounts, and under the law he is charged with superintending the fiscal concerns of the state, and it is with reference to the functions of his office thus designated that we must consider the enactment. He is required "to examine and determine the claims of all persons against the state in cases where provisions for the payment thereof shall have been made by law," and we are led to inquire, *first*, what claims are meant? The answer is, such as the law has made provisions for their payment, and by this is meant such obligations and liabilities as the state may have incurred under warrant of law previously enacted. No person can acquire a valid claim against the state except in such cases as the fundamental law has prescribed or the legislature has through its enactments permitted, and directed, either expressly or impliedly, that payment shall be made for that which constitutes the consideration for the claim. Acting in his capacity as auditor, the secretary is required, when a claim is presented, to look to the law, and determine whether the claimant has brought himself within any of its provisions allowing him compensation. In other words, before allowing the claim he must be able to put his finger upon some law which gives the claimant a standing in his tribunal upon which he can demand payment by the state. For instance, the law has made provisions for the payment to plaintiff of a stated salary for his services, and this constitutes such a claim as is contem-

plated by the statute. Further, he is directed to indorse upon the claim, if allowed, "from what fund the same is to be paid," and it is suggested that the fund here meant is one specially appropriated and set aside by the legislature for the payment of the designated claim, or of a designated class of which it constitutes one. But it is not probable that a fund thus constituted was the one intended for designation by the indorsement. With much greater reason we may infer that it had reference to some one of the few funds that are provided for under general laws in pursuance of fundamental enactments. The constitution directs that "the legislative assembly shall provide for raising revenue sufficient to defray the expenses of the state for each fiscal year," and that "every law imposing a tax shall state distinctly the object of the same to which only it shall be applied": Const., art. 9, §§ 2, 3. And it has been the usage of the legislature, by virtue of these provisions, to direct the levying of taxes for specified purposes, such as for current expenses, for common school, and for university purposes, and the like; thus creating separate and distinct funds into which the revenues flow from the tax collector or other sources of income, and out of which all the expenses of the state government must be met. Taxes levied for current expenses go into the general fund; those for common school purposes, together with interest derived from investments, into the common school fund, and the same with the university and other funds. And if a tax is directed to be levied for a special purpose it goes into the special fund thus provided for, and these are the funds of which the

secretary shall take account in making his indorsements and drawing his warrants upon the treasury. All the earlier appropriations proceeded upon this idea, and the later ones are not in conflict with it. The first general appropriation act adopted in 1860 employed the following language, viz.: "That the following sums be and the same are hereby specifically appropriated to the several objects hereinafter mentioned for two years, * * * to be paid out of any money in the treasury not otherwise appropriated." Then follows an itemized statement of the various salaries and expenses for which it shall be disbursed, without naming or designating any separate fund, thus leaving but a single fund for the secretary to take into account in the indorsement of claims and in drawing his warrants. This practice was continued until 1872, when for the first time the legislature adopted the plan of naming separate funds in the appropriation bills, but subsequent acts have not been uniform in this respect. The language in all to effectuate the appropriation is in purport the same, "to be paid out of any money in the treasury not otherwise appropriated," or from the common school fund, university fund, or other fund, as the case may be. Then follows the naming of subdivided funds, as "executive fund," "general fund," "judicial fund," and the like. But in most of, if not all, these subdivided funds are contained items of salaries and expenses to be paid, as in the former acts. The legislature could, if it saw fit, name a fund for each separate salary or item of expense, but, howsoever the original funds may be subdivided by the appropriation bill, the appropriation is

exhausted as to each separate item as the money necessary to its discharge is paid out by the treasurer; that is, the appropriated funds for any one item are not applicable to the payment of any other item in the whole list, so that after all the specific items govern the disbursements, and not the subdivided funds as designated in the act. The term "fund" is not synonymous with "appropriation," and as a matter of fact there are not many separate funds in the treasury, but there may be many appropriations, and most of the latter are payable out of the same fund—the general fund: *Proll v. Dunn*, 80 Cal. 226 (22 Pac. 143).

This understanding of the term is in harmony with the apparent sense in which it is used in the same act in a clause for the direction and control of the state treasurer. He is required "to pay on demand out of the state treasury all sums authorized by law to be so paid, if there are appropriate funds in the treasury to pay the same, and when any such sum is required to be paid out of a particular fund, it shall be paid out of such fund only; and he shall pay no fund out of the treasury except in pursuance of law authorizing the payment." The first clause enjoins upon the treasurer the duty of paying out of the treasury all sums authorized by law to be paid; that is to say, he, like the secretary of state, in auditing must see to it that the sums disbursed are upon valid claims or demands against the state, such liabilities or obligations as the law has authorized to be incurred. All sums thus authorized by law must be paid if there are appropriate funds in the treasury; and when such sum is required to be paid out of a

particular fund, then out of such fund only. Herein there is no reference to any appropriated fund set aside in the treasury for a specific purpose. The "funds" referred to are such as may be applicable in the disbursement of sums authorized by law to be paid. And the particular fund may be one of the few provided for by law under the constitution. In the latter clause, however, we find an additional limitation upon the action of the treasurer. He shall pay no fund—that is, no one of the funds provided by law, and of course no part of any one of such funds—out of the treasury except in pursuance of law authorizing the payment thereof, or, in other words, the disbursement of the fund. This contemplates an appropriation of the fund, and an inhibition upon the treasurer to disburse it in any event unless so appropriated. The clause authorizing the treasurer to indorse upon warrants "Not paid for want of funds" must be read in connection with these clauses, and, when so interpreted, it becomes at once intelligible and plain without the changing of a syllable or a sentence; otherwise, as under the contention of the counsel for respondent the words "the appropriate fund" must be made to read "appropriated funds." It is elementary that an act must be so construed, if possible, as to give effect to all its provisions, as it is presumed that the legislature intended each to answer some appropriate and specific purpose; and with the interpretation here indicated all the other provisions of the act prescribing and governing the secretary's official duties as auditor of public accounts and in the capacity of superintendent of the fiscal concerns of

the state become operative at all times, otherwise the most important of them must fall utterly into disuse whenever it happens that appropriations have been exhausted, and all the time suspended as to any particular items or claims where funds are not set aside in the treasury for their discharge. We may instance some of them. By section 2208 the secretary is required to report to the legislature at the commencement of each regular session a complete list of all accounts so audited, and to enter in a book kept for that purpose an abstract of all warrants drawn on the treasury, showing the date, number, name of claimant, the amount claimed, the amount allowed thereon, and from which fund to be paid. And by section 2209 it is prescribed that all persons having claims shall present them to the secretary to be audited, settled, and allowed within two years, and not afterwards; that, if any person is dissatisfied with his decision on any claim, account, or credit, it is made his duty, at the request of such person, to refer the same to the legislative assembly; and that in all suits in behalf of the state no debt or claim shall be allowed against the state as a set-off but such as have been exhibited, and by him allowed or disallowed. Under the theory that there can be no auditing unless there is an appropriation, all these clauses, among others, would rest in abeyance for the time being, and in some instances become absolutely nugatory, public service would be impeded, and individuals might suffer an injustice. There is a natural and rational implication from the provisions here alluded to that the secretary should act upon the claims presented to him with reasonable

dispatch; and, as there are no exceptions touching when he shall not act, we infer that the want of an appropriation of funds then applicable will not suspend his decision. We hold, therefore, that when a claim against the state is presented to the secretary he must act upon it, whether there has been an appropriation of funds with which to meet it or not; and, if allowed, he must indorse upon it the amount so allowed, and the fund,—one of the original funds subsisting under provisions of law, not the subdivided or appropriated fund, from which it is to be paid,—and draw his warrant on the treasury for the same. He has nothing to do with the subdivided fund. The treasurer must look to that: *State v. Hoffman*, 35 Ohio St. 435.

The drawing of the warrant is made a part of the act of auditing, and it is the claimant's evidence or certificate of the allowance. Nor is it the drawing of money from the treasury: *Evans v. McCarthy*, 42 Kan. 426 (22 Pac. 631).

The warrant is but *prima facie*, not conclusive, evidence of the validity of the allowed claim; and unless there is authority of law for the payment of such claim, the treasurer may refuse, and, indeed, it is his duty to refuse, to pay the warrant, even if funds are appropriated: *Goldsmith v. Baker City*, 31 Or. 249 (49 Pac. 973); *State v. Lindsley*, 3 Wash. 125 (27 Pac. 1019). The legislature could have provided for auditing or settling claims and demands against the state without at the same time directing the warrant to be drawn, or it could have directed that no warrant should issue without an appropria-

tion, but it has not seen fit to do so, and it seems to be the general policy of our legislation to associate the drawing of the warrant with the auditing of the claim, so that they become part and parcel of the same act. There are some exceptions to be found in the statute, but the particularity with which they are usually specified, directing, in effect, that no warrant shall issue unless there are funds set aside in the treasury with which to meet the demand, but fortifies the idea of the recognized existence of the general plan under which the absence of a prior appropriation of funds is not an objection to the issuance of the warrant: *People v. Lippincott*, 72 Ill. 578; *People v. Secretary of State*, 58 Ill. 94.

It sometimes occurs, however, that special appropriations are made for a particular purpose where the act itself authorizes the incurring of the expense, and is the only warrant of law therefor. In such cases, of course, the measure of the appropriation is the limit of authority to obligate the state, and hence the secretary could neither audit nor draw his warrant, because the claim is not one which the law would recognize as valid against the state: *Flynn v. Truner*, 99 Mich. 96 (57 N. W. 1092).

In coming to this conclusion we have not overlooked the case of *Brown v. Fleischner*, 4 Or. 132. This authority may be regarded as in point, as it was based mainly, if not exclusively, upon the ground that the authority of the secretary of state to audit accounts and draw warrants upon the treasurer depends upon the condition that an appropriation has been made for their payment, although the proceeding was

for a writ of mandamus against the treasurer to compel him to pay warrants. But we firmly believe that the case was decided upon a mistaken interpretation of the statute, and we cannot give our approval to a construction which, in effect, suspends the operation of certain plain and distinct provisions necessary to the due and orderly administration of the public service, and which at the same time nullifies completely one of the most important constitutional functions pertaining to the office of secretary of state whenever there is not a subsisting appropriation. If such was the intention of the legislature, it would no doubt have given some indication thereof in expressing its will pertaining to the subject; and in the absence of such an indication, we feel constrained to believe that such was not its intention. The case of *Brown v. Fleischer* will, therefore, be overruled in so far as it is in conflict with this opinion.

This leaves but one other question to be determined, and that is whether the secretary should be required to audit and draw his warrant for this particular demand. The authorities seem to be uniform that, when the nature and amount of the services rendered the state are definitely fixed and ascertained, and the compensation therefor is regulated by law, such as the salaries of public officers; the duty of auditing and allowing the account or claim for such services becomes a mere ministerial act, the performance of which may be required by mandamus. And so it is with drawing the warrant for the payment of the claim or demand: High on Extraordinary Remedies, §§ 101, 104, 105; *Fowler v. Peirce*, 2 Cal. 165; *Bryan v.*

Cattell, 15 Iowa, 538; *Swann v. Buck*, 40 Miss. 268, 291. In accordance with these considerations, the judgment of the court below will be reversed, and the cause remanded, with directions to that court to overrule the demurrer.

REVERSED.

MR. JUSTICE BEAN.

I concur in the view expressed in the prevailing opinion that under the statute the secretary is not authorized to audit a claim without issuing his warrant to the claimant as evidence thereof. The two acts seem to be made by the statute concurrent. But I am not entirely satisfied with the conclusion that he can be compelled by mandamus to audit a claim and issue a warrant thereon, in the absence of an appropriation by the legislature with which to pay the warrant when issued; but, as my associates are agreed upon the question, I do not feel authorized to dissent upon the doubt I entertain.

[Decided at PENDLETON July 31, 1897.]

KOSHLAND v. HARTFORD INSURANCE COMPANY.

(49 Pac. 866.)

1. **HARMLESS ERROR.**—The erroneous admission of evidence offered in support of an allegation in the complaint which is not denied in the answer is not prejudicial to the defendant.
2. **INSURANCE—MISREPRESENTATION AND CONCEALMENT.**—A failure to disclose the existence of a mortgage on property sought to be insured, when the applicant is not interrogated upon that subject, is not such concealment, misrepresentation, or failure to state the interest of the insured as will render the policy void.

31	402
133	108
31	402
135	30

3. MORTGAGE AS A VIOLATION OF CONDITIONS OF POLICY.—A provision in a policy of insurance that it shall be void "if any change other than the death of the assured take place in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard, whether by legal process of judgment, or by voluntary act of the insured, or otherwise," is not violated by a subsequent mortgage on the property covered by the policy.

From Umatilla: ROBERT EAKIN, Judge.

Action by Marcus S. Koshland against the Hartford Fire Insurance Company. From a judgment for plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Chamberlain & Thomas*, with an oral argument by *Mr. George E. Chamberlain*.

For respondent there was a brief and an oral argument by *Messrs. John J. Balleray and Chas. H. Carter*.

Opinion by MR. JUSTICE BEAN.

This is an action against the Hartford Fire Insurance Company to recover \$1,600 on a policy issued by it to one Charles Cunningham, and by him assigned to the plaintiff after loss. In many of its features the case is similar to the actions brought by the plaintiff against the Home Mutual Insurance Company, 31 Or. 321 (49 Pac. 864), and the Fire Association of Philadelphia, 31 Or. 362 (49 Pac. 865), to recover under policies issued by them, and covering property destroyed by the same fire which caused the loss under the policy now in suit; and therefore the questions presented on this appeal, so far as they have been con-

sidered in those cases, need not be further considered here.

1. It is claimed in this case that the court erred in admitting in evidence a writing purporting to be a denial by the defendant of liability under the policy in suit, signed, "William Reid, Adjuster for the Hartford Fire Insurance Company," and certain telegrams offered for the purpose of showing Reid's authority to bind the company. Considerable space in counsel's brief is devoted to the discussion of this question, and there would be much merit in his contention if the evidence was material to any issue in the case. The only object of its introduction was to show a denial of liability under the policy by the defendant, as an excuse for the failure of the plaintiff to make proof of loss as provided in the policy; but the complaint having alleged that, after the loss, plaintiff offered to make due proof thereof, but the defendant "refused to accept said proof, and denied all liability under said policy, in writing, and waived all proof of loss under said policy," and this allegation of a denial of liability and waiver of proof of loss being admitted by the answer, because not denied, there was no issue before the trial court upon the question of the denial of liability by the defendant, or of Reid's authority to bind it; and hence all evidence tendered upon that subject, and the errors, if any, committed by the court in its admission, were wholly immaterial, and could not have prejudiced the defendant.

2. It is also claimed that the court erred in withdrawing from the consideration of the jury the evidence offered by the defendant in support of the first

separate defense set up in the answer, and instructing them not to consider such defense. By this defense it is averred, in substance, that the policy provides that it shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance, or the subject thereof, or if the interest of the insured in the property be not truly stated therein, and that in violation of this condition the assured falsely and fraudulently concealed from the defendant, its officers and agents, the existence of the mortgage then on the property, and represented to it that the property was unincumbered. The only evidence offered in support of this defense was the application for the insurance, signed by Cunningham, in which it was stated that the property was unincumbered. But the testimony of the local agent of defendant who took the application and issued the policy was to the effect that he filled out the application himself, and could not say whether Cunningham read it or not; that he did not remember whether he knew of the mortgages at the time, or whether he made any inquiry of Cunningham on that subject, or in regard to the property, and could not say where he got the statements which appear in the application. This evidence falls far short of showing that the assured concealed or misrepresented any facts or circumstances concerning the mortgage. A failure to disclose the existence of the mortgages on the property at the time the application was made was no violation of this provision of the policy, nor of the clause that it shall be void "if the interest of the insured in the property be not truly stated

therein," unless he was particularly interrogated upon that subject: *Richards on Insurance*, § 136; *Dolliver v. St. Joseph Insurance Company*, 128 Mass. 315 (35 Am. Rep. 378). It follows, therefore, that the court did not err in instructing the jury to disregard the first defense because there was no evidence to support it.

3. Nor was there error in charging the jury that they need not consider the second defense, for the reason that a subsequent mortgage on property covered by a policy of insurance is not violative of a provision therein that it shall be void "if any change other than the death of the assured take place in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard, whether by legal process of judgment, or by voluntary act of the insured, or otherwise": *Hartford Insurance Company v. Walsh*, 54 Ill. 164 (5 Am. Rep. 115); *Judge v. Connecticut Insurance Company*, 132 Mass. 521; *Walradt v. Phoenix Insurance Company*, 136 N. Y. 375 (32 Am. St. Rep. 752, 32 N. E. 1063). These are all the questions presented in this case which have not already been considered, and, finding no error in the record, the judgment is affirmed.

AFFIRMED.

[Argued March 26; decided April 12, 1897.]

CORBETT v. CITY OF PORTLAND.

(48 Pac. 428.)

31	407
42	490

TAXES BY MUNICIPAL CORPORATIONS.—Power to levy a special tax for any purpose cannot be implied from a provision of a municipal charter fixing upon the rate of taxation a limit in excess of the rate conferred by previous provisions for general municipal purposes.

LIMIT OF TAXATION UNDER PORTLAND CHARTER OF 1893.—Under sections 36 and 204 of the Portland charter of 1893 the municipality cannot levy a tax of more than 8 mills on the dollar, for section 204 is a limitation and not a grant of power.

RIGHT OF MUNICIPAL TAXATION.—The right of taxation is essentially a sovereign attribute to be exercised by municipalities only in the manner and to the extent conferred upon them by their charters, and taxation by such bodies must always be supported by an express or necessarily implied grant of power.

POWER TO COMPEL MUNICIPAL TAXATION.—The courts cannot compel the levy of a tax by a municipal corporation in excess of the limit of taxation imposed in the grant of the taxing power even at the suit of a creditor whose debt will otherwise remain unpaid, unless the limitation is such an abridgment of the right of taxation existing at the time the debt was incurred as in effect to impair the obligation of the contract.

IMPLIED POWER OF TAXATION.—Authority conferred upon a municipal corporation to contract debts or incur other obligations will not alone imply a power to levy taxes to pay such debts or obligations in excess of the limit otherwise imposed on the corporation's power to tax.

From Multnomah: LOYAL B. STEARNS, Judge.

Suit by Henry W. Corbett and others to enjoin the City of Portland and its officers from collecting a certain tax. In the year 1895 the city levied a tax of 8 mills on the dollar on all its taxable property for general and fire and police expenses, and then levied an additional tax of 2 mills ostensibly to be used for paying interest charges. The plaintiff contends that

this 2-mill levy is void because the city had exhausted its taxing power. Section 36 of the charter gives the council power to assess and collect taxes for general municipal purposes not exceeding 8 mills on the dollar; and section 204 provides that during any fiscal year the rates of general and specific taxes levied must not exceed in the aggregate $1\frac{1}{2}$ per centum. The 8-mill levy exhausted the taxing power under section 36, and the question is whether the language of section 204 is a grant of power to levy further taxes, or a limitation on the general power to tax. There was a decree for defendants on a demurrer to the complaint, and plaintiffs appeal.

REVERSED.

For appellants there was a brief and an oral argument by *Messrs. William P. Lord, Joseph Simon, and William T. Muir*, to this effect:

Municipal corporations have no inherent powers of taxation: *Webster v. Harwinton*, 32 Conn. 131; 2 Dillon on Municipal Corporations (4th ed.), §§ 763-765; *Caldwell v. Rupert*, 10 Bush (Ky.), 179; *Drake et al. v. Philips et al.* 40 Ill. 388-9; *State ex rel. Shackleton v. Guttenberg*, 39 N. J. Law, 660; Cooley on Taxation (2d ed.), p. 678-679; *State Railroad Tax Cases*, 92 U. S. 615; *In re Methodist Episcopal Church*, 66 N. Y. 395; *Vance v. Little Rock*, 30 Ark. 435; *Savannah v. Hartbridge*, 8 Ga. 23; *Webster v. People*, 98 Ill. 343.

The power to tax is legislative: Cooley on Taxation (2d ed.), pp. 41-56, and strictly construed; *Caldwell v. Rupert*, 10 Bush (Ky.), 179-182; *Drake v. Philips*, 40

Ill. 388; *Savannah v. Hartbridge*, 8 Ga. 23-26; *Webster v. People*, 98 Ill. 343.

Money collected through taxation for one purpose cannot be used for another, nor can failure to exercise authority given, confer authority not given: *Union Pacific Railroad v. Dawson*, 12 Neb. 254-257; *Webster v. People*, 98 Ill. 343-349.

The intention of the constitution in directing the legislature to limit the rate of taxation which may be imposed by a municipality, and the purpose of the legislature in so limiting it, was to secure economy in the administration of municipal affairs. This intention should be conserved, and the defendant city limited for all purposes, except when otherwise expressly permitted, to the rate of 8 mills: *U. P. R. R. v. Dawson*, 12 Neb. 254-5-7; *City of New Orleans v. United States*, 49 Fed. Rep. 40-43; *Shackelton v. Guttenberg*, 39 N. J. Law, 660-663; *State ex rel. v. Strader*, 25 Ohio St. 527-534, *et seq.*; *Webster v. People*, 98 Ill. 243-349; *McPherson v. Foster Brothers*, 43 Iowa, 48-73; *People v. May*, 9 Colo. 80-91-95.

For respondents there was a brief and an oral argument by *Messrs. William M. Cake*, city attorney, and *Richard Williams*, to this effect:

The moral as well as legal obligation rests on every public corporation to pay its just indebtedness, and taxation is the usual and generally the only recourse for that purpose. In that respect this case is not exceptional. While it is not claimed that there is any inherent power in a municipal corporation to levy and collect taxes, it is claimed that when such a cor-

poration has, pursuant to express authority, created indebtedness, or has indebtedness placed upon it by legislative act, as in the acts of consolidation, the power if not expressly given may be implied to pay such indebtedness by taxation: *Butz v. Muscatine*, 75 U. S. (8 Wall.), 581; *Loan Association v. Topeka*, 87 U. S. (20 Wall.), 660; *Hasbrouck v. Milwaukee*, 25 Wis. 112; *United States v. New Orleans*, 98 U. S. 393; *Avery v. Job*, 25 Or. 520; 2 Dillon on Municipal Corporations, § 741; Cooley on Taxation, 76-138.

The Portland charter of 1893, section 36, subdivision 38, empowers the council to appropriate money to pay the debts, liabilities, and expenditures of the city, or any department thereof, or any part or item thereof. It is admitted that the bonded indebtedness of the city to the amount of \$1,231,500 is lawful, and no question is made concerning the duty to pay it with interest. If the duty is once imposed upon the city to pay this indebtedness, no subsequent act of the legislature could impose a limit which would curtail the power or affect the duty to do so: 1 Dillon on Municipal Corporations (2d ed.), § 41; Cooley on Taxation, p. 76, note 3; 2 Beach on Public Corporations, §§ 1410-1418; *Van Hoffman v. City of Quincy*, 4 Wall. 535, 554, 555; *People v. Bond*, 10 Cal. 570; *Wolf v. New Orleans*, 103 U. S. 358-365; *Fisk v. Jefferson Police Jury*, 116 U. S. 131.

This court is asked to curtail the current necessary expenses of the city, and to direct the council to appropriate less money therefor, and to so manage the affairs of the city that enough shall remain from the amount realized by it from the levy of 8 mills to pay

the interest on the bonded indebtedness. It is the well established rule that legislative power cannot in these respects be controlled by the court: *Cooley on Taxation* (2d ed.), 740; 2 *Beach on Public Corporations*, 817, § 797; *Dibble v. Tonnshal*, 56 Conn. 199; *Methodist Church v. Baltimore*, 31 Md. 299; *East St. Louis v. Zebley*, 110 U. S. Rep. 324; *Blanding v. Burr*, 13 Cal. 351-2.

Opinion by MR. JUSTICE BEAN.

This is a suit by H. W. Corbett and others to restrain the collection of a special tax levied by the City of Portland for the payment of interest charges on its bonded and other indebtedness. It is alleged in the complaint that on June 30, 1895, the common council of the city, by ordinance No. 9103, levied a tax of 8 mills on the dollar for general municipal purposes, and, on the same day, by ordinance No. 9104, an additional tax of 2 mills for the payment of the annual interest charges on the bonded and other indebtedness of the city; that there is no warrant or authority of law for the passage of the latter ordinance, or for the attempted levy of such additional tax, and that all proceedings in reference thereto are void and of no effect. The complaint further alleges that in and by the act of incorporation of the defendant city it is provided that the levy of taxes for general municipal purposes shall not exceed in any one year 8 mills on the dollar, and out of the sum realized therefrom, and the other revenues of the city, it must pay the interest charges and all other general municipal expenses. It is also alleged that prior to the

commencement of this suit the plaintiffs paid, or tendered and offered to pay, the full amount of the 8-mill tax assessed against them by ordinance No. 9103, and that the defendant Sears, as sheriff of Multnomah County, threatens to and will, unless restrained, attempt by levy and sale to collect the remaining 2 mills, and therefore an order is prayed for enjoining and restraining the collection of such additional tax. The defendants filed an answer in which they admit the levy of the general and special tax as alleged, but deny that the latter was without authority of law, and, further answering, allege that it will be impossible to successfully conduct the affairs of the city, and meet the current lawful expenses and interest on the public debt, without the additional revenue which the special 2-mill tax is expected to yield, and that in the opinion of the mayor and common council both levies were indispensable to meet the public exigencies. A reply having been filed, the cause was tried, and a decree rendered dismissing the complaint, from which the plaintiffs appeal.

It appears that in July, 1891, the then cities of Portland, East Portland, and Albina were consolidated into one municipality, under the name of the "City of Portland," by an act of the legislature, filed in the office of the secretary of state, February 19, 1891: (Laws 1891, p. 796.) By the terms of this act the title to all the public property belonging to the municipalities referred to became the property of the consolidated city, and it was made liable for their indebtedness, amounting at the time, in the aggregate, to the sum of \$681,000. This amount has since been

increased by legislative authority until at the time this suit was commenced the entire bonded indebtedness, the interest of which is payable from the general revenues of the city, amounted to \$1,181,500, and the interest thereon to \$73,907.65. By the charter of the consolidated city, which imposed thereon the debts of its predecessors, and under which the additional bonded indebtedness was incurred, the common council was authorized and empowered to assess, levy, and collect a tax on all the taxable property in the city of 3 mills on the dollar for general municipal purposes, a special tax of $3\frac{1}{4}$ mills for the fire department, and a like tax for the police department, making a total of 10 mills on the dollar. In 1893 the charter of 1891 was repealed, and a new one enacted, which was in force at the time the tax in question was levied, and by which its validity must be determined. The portions of the latter charter, material to this controversy, are as follows:—

“Section 36. The council has power and authority within the City of Portland: 1. To assess, levy, and collect taxes for general municipal purposes, not to exceed 8 mills on the dollar, upon all property, both real and personal, which is taxable by law for state or county purposes”: Laws 1893, p. 819.

“Section 176. The board of fire commissioners shall on the first day of January of each year, or as soon thereafter as practicable, report to the common council the estimated amount of salaries and other necessary expenses of the fire department for the ensuing year, together with the estimated cost of constructing and erecting cisterns and hydrants, and the

erection and the repair of buildings, the purchase of lots for the purpose of erecting engine houses thereon, the purchase of engines, hose carts, hose, horses, feed, material and apparatus for said department required for the ensuing year; and the common council shall, if they deem the same practicable, at the same time that other taxes are levied and collected, levy and collect a special tax sufficient to raise the amount so estimated by the board of fire commissioners, which tax shall be paid into a fund to be known as the fire department fund of said City of Portland, and shall be subject solely to the control of the said board of fire commissioners, and shall be paid out by the city treasurer upon warrants drawn by the mayor and auditor of the said city upon requisitions therefor made by the president of the board of fire commissioners, for claims duly allowed by said board; and the mayor and auditor are hereby directed to draw warrants on said fire department fund in accordance with the requisition of said president of the board of fire commissioners, such requisitions to remain on file in the office of the auditor, and to be sufficient authority for drawing warrants as aforesaid": Laws 1893, p. 861.

"Section 204. The fiscal year of the city shall commence on the first day of January and end on the last day of December of each year, and during any such year the rates of general and specific taxes levied must not exceed, in the aggregate, 1½ per centum": Laws 1893, p. 867.

The principle is universal that whenever a municipality or other governmental agency of a state seeks to impose the burden of taxation upon a citizen or

upon his property it must be able to show the grant of such power by express words or necessary implication. No doubtful inference from other powers granted or from obscure provisions of the law, nor mere matter of convenience, or even necessity, will answer the purpose. The grant relied upon must be evident and unmistakable, and all doubts will be resolved against its exercise, and in favor of the taxpayer. "Every municipal corporation, and every political division of the state, which demands taxes from the people," says JUDGE COOLEY, "must be able to show due authority from the state to make the demand": Cooley on Taxation, 474. Or, as JUDGE DILLON puts the same doctrine, "It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred. It has, indeed, often been said that it must be specifically granted in terms; but all courts agree that the authority must be given either in express words or by necessary or unmistakable implication, and that it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor can it be deduced from any consideration of convenience or advantage": 2 Dillon on Municipal Corporations (4th ed.), § 763. It is by the application of these fundamental principles to the granted powers of the defendant city that the case in hand must be determined, and, in our opinion, it presents no serious difficulty. It is admitted that there is no express power to levy taxes conferred by the charter, other than that granted by sections 36 and 176, and

it is not claimed that the tax in question was levied under the provisions of either of these sections. The contention for the city is that section 204 confers by implication the power to levy taxes for special purposes, in addition to the 8 mills authorized by section 36, to the extent, in the aggregate, of 15 mills. We are unable to concur in this construction of the section. It is argued that the legislature, having limited the rate of taxation for general purposes to 8 mills, and subsequently provided in section 204 that the rate of general and special taxes must not exceed in the aggregate $1\frac{1}{2}$ per cent. in any fiscal year, it intended to and did thereby authorize, by implication, the levy of special taxes to the amount of 7 mills. In short, it is sought to imply the power of taxation from mere words of limitation; but manifestly the grant of a power by the exercise of which a citizen may be deprived of his property in invitum cannot be safely thus inferred. The section in question is found among the miscellaneous provisions of the charter, and was evidently copied from that of 1864 into each succeeding charter, without noticing that it did not conform to the actual limit on the power of taxation elsewhere provided in the respective charters. It was not originally intended as a grant of power, and obviously cannot be so construed. It does not declare that a special tax may or shall be levied; all that is said on the subject is that the aggregate rate of taxation in any one year shall not exceed a certain limit. It would be indeed strange if the legislature, intending to confer the important right to levy taxes in excess of the power already granted, should have left such intention to be

ascertained by doubtful inference from a mere limitation on the power of taxation in a section of the charter relating to the beginning and ending of the fiscal year, and that, too, without any declaration or provision anywhere in the charter as to the purpose for which this special tax might be levied. The power to tax, and the purposes for which the money derived therefrom should be used, are to be found elsewhere in the charter, and if it was intended to authorize the levy of an additional special tax to pay interest on the bonded indebtedness it is hard to see why it was not done when the subject of taxation was before the legislature. It appears quite clear that section 204 cannot be so construed as to confer the power to levy a special tax for any purpose, but that all the power of taxation possessed by the defendant city under its charter must be found in sections 36 and 176 above quoted.

But it is strenuously insisted that under this construction of the charter the city will be unable to meet its current expenses and pay the interest on its outstanding indebtedness. If true, this argument might be a very persuasive one if addressed to the lawmaking power; but it can have no weight with the judiciary, whose duty it is to interpret and not make laws. The power of taxation is a sovereign right which belongs exclusively to the legislative branch of the government, and can only be exercised by subordinate governmental divisions in pursuance of laws passed by the legislature for that purpose. They are but instrumentalities of the state, brought into existence for public purposes, and have no authority be-

yond that conferred by the law creating them. They have no inherent power of taxation. Their right to impose burdens upon persons or property is wholly statutory, and can be exercised only to the extent granted. And when the limit prescribed in the grant of the taxing power is reached the power is exhausted, and the courts cannot even compel the levy of a tax in excess of that limit at the suit of a creditor whose debt would otherwise remain unpaid, unless the limitation is such an abridgment of the right of taxation as it existed at the time the debt was incurred as in effect to impair the obligations of the contract: 15 Am. & Eng. Enc. Law (1st ed.), 1140; *United States v. Mayor of Burlington*, 2 Am. L. Reg. (N. S.) 394, and Judge DILLON's valuable note thereto; *Portland Savings Bank v. Montesano*, 14 Wash. 570 (45 Pac. 158); *Vance v. City of Little Rock*, 30 Ark. 435; *Supervisors v. United States*, 85 U. S. (18 Wall.), 71; *Clark v. City of Davenport*, 14 Iowa, 497; *State ex rel. v. Shortridge*, 56 Mo. 126. If, under its granted powers, a municipality cannot provide sufficient revenue, in the opinion of its officers, for municipal purposes, the only alternative, if its limit of indebtedness has already been reached and its financial honor is to be preserved, is either an application to the legislature for more extended powers of taxation, or a reduction of expenses so as to bring them within the income. By the constitution the legislature is required in granting charters to municipal corporations to restrict their powers of taxation: Constitution of Oregon, article XI, § 5. In obedience to this provision of the fundamental law it is provided in the charter of the defendant city that

taxes for general municipal purposes, which of course includes the payment of its outstanding obligations, unless otherwise provided in the law under which they were created, shall not exceed 8 mills on the dollar. The object of this limitation is manifestly to secure the property-owner against onerous and excessive taxation, and to enforce economy in the expenditure of public money. It was the evident intention of the legislature that the amount of revenue derived from the 8-mill tax, and no more, should be raised by the City of Portland from the taxable property of its inhabitants in any one year for general municipal purposes, and no additional amount can be collected for that purpose by an unauthorized special levy for some item of general municipal expense. If the provisions of the charter could thus be avoided, it would afford no protection to the taxpayer whatever, would be no restraint upon official extravagance, and would utterly fail to accomplish the purpose intended by the legislature and the framers of the constitution.

But it is claimed that the act of 1891, creating the defendant municipality, imposed upon it a part of the present bonded indebtedness, and authorized the creation of the remainder, and, as no express provision was made for the payment of such indebtedness, it necessarily follows that it must be paid from money raised by taxation. No doubt this is true, but it does not follow that a special tax in addition to the general tax authorized by the charter may be levied for that purpose. The limitation upon the taxing power contained in the act imposing and authorizing the creation of such indebtedness plainly repels the

inference that the legislature intended to authorize the levy of an additional or special tax with which to pay it. It is often said that authority to a municipal corporation to create a debt implies power to raise the means with which to pay it by taxation, but this is true in a general sense only. Of course every lawful debt of a municipality is a liability against it, and payable from its general funds, unless otherwise provided, and as the usual, and indeed, generally, the only, means a city has of raising money is by taxation, it necessarily follows that its indebtedness must be paid from the revenue thus derived. But it is not believed that mere authority to create a debt authorizes, per se, the levy of a special tax for its payment. It is quite true, as we have remarked, that the right of a municipality to incur an obligation generally implies the right to pay it by taxation, but such right must always be exercised in accordance with the provisions of the law conferring the power of taxation, and in subordination to the limitations imposed by the legislature on the exercise of such power. If, therefore, the power of a municipality to levy taxes is expressly limited to a certain amount, an authority to contract debts or incur other obligations will not alone justify an inference that the power to levy an additional tax to pay such debts or obligations was also conferred: *Shackelton v. Town of Guttenberg*, 39 N. J. Law, 660. It follows that the special 2-mill tax levied by the defendant municipality for the purpose of paying the interest on its bonded and other indebtedness is unauthorized and void. The decree of the court below is therefore reversed, and a decree will be entered here enjoining the collection thereof.

REVERSED.

[Decided December 27, 1897.]

SMITH v. WILKINS.

(51 Pac. 423.)

81 421
88 544

SUPREME COURT—REVERSAL OF EQUITY CASE—PRACTICE.—Where it appears that a party has not been afforded an opportunity to present a defense, and that he has not been inexcusably negligent in the matter, the supreme court may, under the terms of section 102, Hill's Ann. Laws, relieve him from the consequences, and remand the case for further proceedings instead of ordering a final decree: *Branson v. Oregonian Railway Company*, 10 Or. 278, followed.

From Benton: J. C. FULLERTON, Judge.

Suit by J. R. Smith & Co. against M. W. Wilkins and others, being a consolidation of several suits to foreclose mechanics' liens against defendant Wilkins. From a decree dismissing his cross bill, defendant F. E. Beach appealed, and the decree was affirmed.* On motion of said defendant to remand the cause with permission to apply for leave to amend.

GRANTED.

Mr. Geo. G. Gammans, for the motion.

Mr. H. C. Watson, contra.

PER CURIAM. Upon the former hearing the decree of the court below was affirmed on the ground that Beach's answer was insufficient (48 Pac. 708), but it now appears that all the record was not before the court at the time. A portion of it had been misplaced, and did not get into the judgment roll, and, as the attorney who took and prosecuted this appeal

*By direction of the court the first opinion in this case (48 Pac. 708) is omitted from the official reports.—REPORTER.

did not try the case in the court below, he was not aware of and did not discover the defect, nor was the misplaced portion of the record found, until after the former decision. Application was made for a rehearing and for a rule on the court below to complete the record. From the record, as we now have it, it appears that, in addition to his complaint in the suit brought to foreclose his lien, and which was, by stipulation of the parties, consolidated with the Smith case, Beach filed at least two answers in the consolidated suit; but it is not clear what disposition was made of them, or upon which one the cause was tried in the court below, if upon either. Indeed, it would seem from the findings of fact and decree that Beach's lien was held invalid on a question of fact not raised by the pleadings, and which was not regarded at the trial before the referee as an issue in the case; but of this we cannot determine. The record is in such inextricable confusion, and involved in such uncertainty, that it is impossible to intelligently ascertain the questions really litigated between the parties to the appeal in the court below, or the rights of the parties, and, as such condition does not seem to be the result of inexcusable negligence on the part of Beach, his motion to remand, with permission to apply to the court below for leave to amend his answer so as to present the real issues in the case, and for a trial upon the merits, so far as his rights are involved, should be allowed: *Branson v. Oregonian Railway Co.* 10 Or. 278, seems to be a precedent for such a proceeding, and, without further elaboration of the facts, it is sufficient to say that we are all agreed that this is pre-eminently

a case calling for a like remedy. The decree heretofore entered will therefore be vacated, and set aside, and this cause remanded to the court below for the purpose indicated.

[Decided December 27, 1897.]

**WOODWARD v. OREGON RAILWAY AND
NAVIGATION COMPANY.**

(51 Pac. 450.)

ISSUING MANDATE—PAYMENT OF COSTS.—After an unreasonable delay in having a mandate issued to the lower court, upon reversal of its judgment, and in proceeding with a new trial, the respondent ought to pay the accrued costs on appeal before the mandate will issue: *Woodward v. Oregon Railway and Navigation Company*, 23 Or. 331, followed.

From Multnomah:

Motion by plaintiff for leave to take out a mandate without paying the costs and disbursements taxed to defendant on the appeal.

DENIED.

Mr. Cicero M. Idleman, for the motion.

Mr. William W. Cotton, contra.

PER CURIAM. This is a motion for leave to take out a mandate, without the payment of costs, in an action brought by the plaintiff against the defendant in 1888 to recover damages for an injury caused by the alleged negligence of the defendant, and reversed by this court on January 6, 1890 (18 Or. 289, 22 Pac. 1076), but in which the mandate was withheld until the further order for the court. The facts upon which the present motion is based are substantially the same

as those of a similar application in December, 1892, and there is, therefore, no reason why the order made at that time (23 Or. 331, 36 Pac. 571) should be now so modified as to permit the mandate to issue without the payment of costs. The motion is therefore denied.

DENIED.

[Argued October 13; decided October 25, 1897.]

LANDIS v. LINCOLN COUNTY.

(50 Pac. 530.)

1. LINCOLN COUNTY — FEES OF OFFICERS — STATUTES — CONSTRUCTION. — The act of 1893, creating Lincoln County (Laws 1893, p. 66), provides that the sheriff of the county "shall receive the same fees as are now allowed by law to the sheriff * * * of Benton County." The general salary law (Laws 1893, p. 163), enacted two days later, provides that the sheriff of Benton County shall receive an annual salary of \$2,400. *Held*, that the first law was not affected by the subsequent enactment; said former law contemplating that the sheriff of Lincoln County shall receive the same compensation as the sheriff of Benton County for like services under the fee system, and not that their aggregate annual compensation shall be the same.

SPECIAL AND LOCAL LAWS. — The law of 1893, fixing the salaries of the sheriffs in all the counties but one in Oregon (Laws 1893, p. 163), is not void because it is a local or special law in respect to salaries; the generality of application required by article IV, § 23, subdivision 10, of the constitution, refers to the assessment and collection of taxes, not to the fees and salaries of public officers: *Northern Counties Trust v. Sears*, 30 Or. 338, explained.

From Lincoln: J. C. FULLERTON, Judge.

Application by George A. Landis for a mandamus on Lincoln County and its county court, which was refused; hence this appeal.

AFFIRMED.

For appellant there was a brief over the names of *Weatherford & Wyatt*, and *Walter S. Hufford*, with an

oral argument by *Mr. Hufford* and *Mr. Jas. K. Weatherford*.

For respondent there was a brief over the names of *W. E. Yates*, district attorney, and *Martin L. Pipes*, with an oral argument by *Mr. Pipes*.

Opinion by MR. JUSTICE WOLVERTON.

This is a proceeding by mandamus instituted by the sheriff of Lincoln County to compel the county court of said county to audit and allow his claim for services as such sheriff for the months of August, September, October, and November, of the year 1896, amounting to the sum of \$666.66. There was a demurrer to the alternative writ, which being overruled, judgment was rendered against plaintiff, dismissing the action, from which he appeals.

1. The solution of the sole question in this case depends entirely upon the construction to be given the following clause contained in an act entitled "An act to create the County of Lincoln and to fix the salaries of county judge and treasurer thereof," viz.: "The sheriff and county clerk of said county shall receive the same fees as are now allowed by law to the sheriff and county clerk of Benton County:" Laws 1893, p. 66. At the time the act passed both houses and received the signatures of the presiding officers, there was pending an act to change in part the compensation and mode of payment of certain county officers, including clerks and sheriffs. This latter act (Laws 1893, p. 163) was first introduced, but passed both houses and received the signatures of the presiding

officers two days later. By section 12 thereof it was provided that the provisions of the act should not apply to the clerks, sheriffs, and recorders of conveyances then in office, and all acts and parts of acts in conflict therewith were repealed. The act further provided that the sheriff of Benton County should receive an annual salary of \$2,000, which, together with the salaries of other county officers established in like manner, should be audited and paid by the several counties to the respective parties entitled thereto in monthly payments, and in the same manner that other county charges are paid. It also established a salary for the sheriff and clerk of every other county in the state, except Lincoln, which act was amended in 1895, but not as it pertains to any matters here alluded to.

It is contended that the two acts should be construed in *pari materia*, in determining the compensation of the sheriff of Lincoln County, and that the word "fees," used in the Lincoln County act, should be construed to signify compensation, and should take the form of the compensation received by the sheriff of Benton County, whether by the receipt of fees, under the old law, up to the first Monday in July, 1894, or by a fixed salary thereafter, as established by the act of 1893. By the ordinary acceptance of the term "fees," as heretofore and now used in the statute, we understand it to signify compensation or remuneration for particular acts or services rendered by public officers in the line of their duties, to be paid by the parties, whether persons or municipalities, obtaining the benefit of the acts, or receiving the services, or at

whose instance they were performed (*Musser v. Good*, 11 Serg. & R. 247; *Tillman v. Wood*, 58 Ala. 578), while the term "salary" denotes a recompense or consideration to be paid a public officer for continuous, as contradistinguished from particular, services, and may be denominated "annual or periodical wages or pay" (*Cowdin v. Huff*, 10 Ind. 83; Black. Law Dictionary), Lexicographers and some authorities class "salary" and "wages" as synonymous (see Webster, and Rapalje & Lawrence's Law Dictionary, and *Commonwealth v. Butler*, 99 Pa. St. 535); but not so with the terms "salary" and "fees," as they appear generally to be distinguished very much as is indicated above. But the interpretation of the acts in question does not depend so much upon the technical definition of the terms as upon the sense in which they were used by the legislature. The real intention of that body in calling them into requisition as agencies for the expression of its legislative will ought to and will control. The term "fees" is not so inflexible as that it may not have been used in the sense of "salary" or "wages." We may cite an instance. Section 2364, Hill's Ann. Laws, provides that the fees of the assessor shall be \$3 per day, in certain counties \$4, and that in Multnomah County he shall receive \$6,000 per annum for his services.

Now, it is evident that the legislature meant by the use of the term "fees," in that section, to signify the compensation to which the assessor should be entitled. But, in order to determine the legislative intent, we must look to the conditions of the old law touching the compensation of sheriffs, and the cir-

cumstances and conditions attending the enactment of the laws we are called upon to interpret. When the bill creating Lincoln County was introduced, the sheriff of Benton was receiving, as compensation for his services as such officer, certain fees for particular services, which were required to be paid by the parties receiving the services. It was in the light of this condition of the law, undoubtedly, that it was drafted and introduced. So that, in providing that the sheriff of Lincoln County "shall receive the same fees as now allowed by law to the sheriff * * * of Benton County," it is perfectly apparent, without further comment, what compensation the legislature meant to establish as a consideration for the services of the sheriff of Lincoln when the bill was introduced. After the bill passed the house, however, the bill for a change in the fee system was duly adopted at the same session, which repealed the old law in so far as it affected the manner in which the sheriffs of all the counties in the state should be compensated for their services as public officers: *Northern Counties Trust v. Sears*, 30 Or. 388 (35 L. R. A. 188, 41 Pac. 931). But it did not affect the incumbents, who continued to receive the same fees and perquisites, and in the same form, until the first Monday in July, 1894, the date of the expiration of their several terms. Nor did the legislature make any change in the Lincoln County act regarding the sheriff's compensation. While the conditions had changed somewhat, it does not seem that the legislature deemed it necessary or advisable to amend the bill in that particular so as to cover all phases of the new conditions, and we must therefore

conclude that the legislative intent remained the same at the time of the adoption of the act as it stood at the date of its introduction. Nor does the fact that the act revoking in part the fee system has been subsequently amended assist us in determining the proper interpretation of the acts in question. In the amended act the Lincoln County sheriff was omitted from the list providing salaries as in the original act, and very probably by sheer oversight. When the salary bill was introduced, Lincoln County was not in existence, and was therefore omitted from the list of counties whose sheriffs were provided for; and when it was amended the fact that it was not included was probably overlooked, and hence the lack of legislation concerning it. The words of the Lincoln County act, viz: "the same fees as are now allowed by law," are of controlling signification. It was not intended that his compensation should be the same, but that he should receive the same compensation for like services. If he summoned a jury, or served a warrant of arrest or writ of execution, he was to receive the same compensation for the particular services rendered as the sheriff of Benton County should receive for like services. And, while the sheriff of Benton County might have much to do, the sheriff of Lincoln County might have little; and, while the compensation for the same services were intended to be the same, it was not intended that their aggregate annual compensation should be the same, unless they earned it under the fee system then extant and prevailing. Hence it would be illogical and unwarrantable to infer that the legislature intended that the sheriff of

Lincoln County should receive the same salary that the sheriff of Benton County should receive subsequent to the first Monday in July, 1894, and we cannot thus interpret the law. It is, perhaps, an unfortunate condition of the law; but the courts are powerless to correct it, as they must construe legislative enactments in accordance with the evident intent of the legislature in adopting them.

2. It is suggested in the brief of counsel, and was urged at the argument, that, if the Lincoln County act did not provide for a salary as compensation for the sheriff of that county, then the act changing the fee system was unconstitutional and void, in so far as it did not provide a general system for the compensation of clerks and sheriffs, reaching throughout the state. This involves a misconception of the ground upon which the *Sears* case was decided. The question made there was that the act was unconstitutional and void because it was an act for the assessment and collection of taxes for state and county purposes, and that it was local and special because Lincoln County was not included within its purview. And it was held, admitting only for the sake of the argument that it was a revenue law, that the law was general in so far as it attempted to provide a system for the collection of revenues from suitors and others, and that the fact that the act omitted to provide a salary for the sheriff and clerk of Lincoln County would not render it amenable to the objection that it was local or special. The generality of the law required by the constitution pertains to the assessment and collection of taxes, and not to the subject of fees and salaries of public officers.

We have been asked by the defendant, for the guidance of the County Court of Lincoln County, to indicate what powers, if any, it has in the premises to compensate the sheriff and clerk out of the funds of the county; but this is a matter we cannot now determine, as it involves a question foreign to the case made upon the record, and what we might say pertaining to it would be obiter, and not of binding force upon litigants.

AFFIRMED.

[Argued October 18; decided October 25, 1897.]

ROCKWELL v. PORTLAND SAVINGS BANK.

(50 Pac. 566.)

81	431
139	244
20	299

RECEIVERS—LIEN OF CREDITOR FOR UNPAID DIVIDENDS.—Where a creditor fails to avail himself of an order of court directing a receiver of an insolvent institution to distribute money in his hands as such receiver, the creditor does not thereby obtain a lien upon the remaining assets for his pro rata share in such fund.

DISCHARGE OF RECEIVER—NOTICE.—A receiver who has been appointed pendente lite, in a suit to wind up the affairs of an insolvent corporation, may be discharged without notice to the creditors generally; and, too, the suit itself may be so dismissed on motion of the complaining party.

LIEN ON INSOLVENT ESTATE—TRUST FUNDS.—In order to impress upon the assets of an insolvent estate a lien for trust funds it must appear either that the identical fund is still among the assets awaiting distribution, or that the property sought to be subjected to the lien includes such funds or their proceeds; thus, where a receiver was appointed for an insolvent bank pendente lite, and funds ordered to be distributed were not called for by certain creditors, and, on dismissal of the suit, were returned to the bank and expended by it in the usual course of its business, and the bank itself afterwards declared other dividends in favor of the same creditors, which were not claimed, and were also expended, all such dividends lost their identity as trust funds and did not pass to a subsequent receiver of the bank as particular funds: *Ferchen v. Arndt*, 26 Or. 121, and *Muhlenberg v. Northwest Trust Company*, 26 Or. 132, approved and applied.

From Multnomah: **LOYAL B. STEARNS**, Judge.

Petition by Maurice Liebmann, administrator of the estate of Charles Gutman, deceased, against O. N. Denny, as receiver of the Portland Savings Bank of Portland, appointed in a suit against said bank by Cleveland Rockwell. From a decree for defendant, petitioner appeals.

AFFIRMED.

For appellant there was a brief over the name of *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Joseph N. Teal*.

For respondent there was a brief over the name of *Dolph, Mallory & Simon*, with an oral argument by *Mr. Rufus Mallory*.

Opinion by MR. JUSTICE BEAN.

This is an appeal by Maurice Liebmann, administrator of the estate of Charles Gutman, deceased, from a ruling of the Circuit Court of Multnomah County denying his petition for an order requiring the receiver in the above-entitled suit to pay out of the assets in his hands certain dividends, to which the petitioner claims to be entitled as a creditor of the defendant bank. The facts are that on July 28, 1893, D. P. Thompson was duly appointed receiver, *pendente lite*, of the property and effects of the defendant bank, in a suit then brought against it by the present plaintiff to close up the affairs of the corporation, alleging that it was unable to pay its debts and that the assets would be wasted by attachments unless the court should sequester them. He immediately thereafter qualified and entered upon and continued in the

discharge of his duties as such receiver until May 1, 1894, when the suit was dismissed without any formal decree, the receiver discharged, and the property in his hands ordered restored to the bank. At the time of the closing of the bank and Mr. Thompson's appointment, there was due Gutman, as a depositor in the savings department, the sum of \$8,129.81, besides interest. On February 15, 1895, he died, and on May 6 of the same year the petitioner was duly appointed administrator of his estate in Oregon. On February 1, 1894, and during the pendency of Mr. Thompson's receivership, the court made an order directing him to pay a dividend of 10 per cent. on all the claims against the bank, but Gutman did not apply for or receive the amount to which he was entitled under this order, and the money from which it was to be paid was, by order of the court, delivered to the officers of the bank, upon the dismissal of the suit, and was subsequently used by them for the benefit of the bank and other persons. After the suit had been dismissed and the property restored to the bank, it proceeded in the management of its business, and, as the petition alleges, declared dividends on the first days of May, August, and November, 1894, of 10 per cent. each on all the claims against the bank; but Gutman never applied for or received any of such dividends, or any part thereof, although the money was on hand at the time with which to pay them. Thereafter, and on the nineteenth of November, 1894, the bank being unable to longer continue in business, the present suit was brought against it to wind up its affairs and distribute its assets among those entitled

thereto, and O. N. Denny appointed receiver of its property and effects, since which time he and his successors in office have had the possession and control of its assets pending the litigation. On August 1, 1895, this petition was filed, asking for an order directing the receiver in the present suit to pay from the assets in his hands the dividend declared by the court and unpaid by the former receiver, and also the amount of the three several dividends declared by the bank while it was doing business in the interval between the dismissal of the first suit and the commencement of the present one.

1. The prayer of the petition was denied, and, we think, properly. It is contended, on behalf of the petitioner that by the order of distribution of February 1, 1894, the dividend to which his intestate was entitled became a preferred lien upon all the assets of the defendant bank, and, since a portion of such assets are now in possession of the present receiver, the amount of such dividend should be paid therefrom in preference to the claims of general creditors. But we do not think the order of distribution can be given the effect claimed for it. It was nothing more than a direction by the court to its officer to make a pro rata distribution of the money then on hand among the creditors, and did not create a lien on the remaining assets in their favor. The receiver was the agent of the court for the purpose of protecting and preserving the property and effects of the bank pending the litigation, and when, as such agent, he had, by authority of the court, converted into cash a portion of the assets, it was eminently proper that

it should be distributed among the creditors in proportion to their respective demands, but the order for that purpose could have no other effect than a similar direction to any other custodian of funds under the control of a court. It was necessary and proper, in the orderly conduct of the proceedings then pending, and as a protection to the receiver; and, if it was not obeyed, the remedy of the injured party was by an application to the court which made it, and not by way of a lien upon the remaining assets.

2. It is claimed, however, that the suit was dismissed and the receiver discharged without notice to the petitioner, or any opportunity to be heard in the matter, and for this reason he is now entitled to the order prayed for. But, as we have said, the receiver was but a temporary officer or agent of the court pending litigation, and it was within the power of the court to dismiss the suit and discharge him without any notice to the general creditors: *Telegraph Company v. Jewett*, 115 N. Y. 166 (21 N. E. 1036). Whether it acted wisely in doing so is a matter with which we are not concerned at this time. We cannot review that question on this appeal, as the suit in which the present proceedings were instituted is entirely separate and distinct from the one in which the distribution was decreed.

3. It is also claimed that when the dividends were declared by the court in the former suit, and by the bank itself after the termination of such suit, the amount thereof became a trust fund in the hands of the receiver and the bank for the various creditors, which a court of equity will direct to be paid out of

assets now in the hands of the present receiver before the payment of any other creditors. But the vice of this position lies in the fact that none of the funds out of which such dividends were to be paid came into the hands of the present receiver, or form any part of the present assets of the Portland Savings Bank; but, on the contrary, as is averred in the petition, they were, prior to the commencement of this suit, "unlawfully and wrongfully used and diverted from their proper purposes by the officers of said bank, and for the benefit of said bank, and for the benefit of others whose names are unknown to the petitioner." It therefore clearly appears from the petition itself that the money representing the dividends for which a preference is now claimed was used and expended by the bank and its officers in the usual course of its business after the termination of the first suit, and before the commencement of the present one, or the appointment of a receiver therein, and is not, either in its original or changed form, any part of the trust fund now under control of the court. The doctrine referred to, therefore, for this reason alone, if for no other, has no application here.

The question as to when and under what conditions a court of equity will impress upon the assets of an insolvent a lien for trust funds was thoroughly considered in the case of *Ferchen v. Arndt*, 26 Or. 121 (29 L. R. A. 664, 46 Am St. Rep. 603, 37 Pac. 161); and *Muhlenberg v. Trust Company*, 26 Or. 132 (29 L. R. A. 667, 38 Pac. 932), and it was there held that, before such preference will be given, it must appear either that the identical fund is still among the assets

awaiting distribution, or that the property of the debtor sought to be subjected to a preference includes such funds or their proceeds. As we have already seen, the admitted facts in this case show that no part of the money with which the dividends referred to were to be paid, or the proceeds thereof, entered into or form any part of the trust fund now under the control of the court. It is clear, therefore, that the petitioner is not entitled to the relief demanded, and the decree of the court below is affirmed.

AFFIRMED.

[Decided November 15, 1897.]

THAYER v. NEHALEM MILL COMPANY.

(51 Pac. 202.)

1. **CORPORATIONS—AUTHORITY OF AGENT TO MORTGAGE.**—The directors of a corporation which owned a sawmill and store and a portion of the town site at the place where they were situated, which was at a distance from the office of the company and the residence of all its officers and directors, appointed a general manager, "with full power to manage and conduct the business of the corporation." Such manager conducted the business for some two years, buying logs, and manufacturing them into lumber, which he sold, hiring and discharging men, selling town lots, and receiving and disbursing the proceeds of the business. *Held*, that such manager had authority to execute a mortgage in behalf of the corporation on the town lots and logs and lumber at the mill, all which was held for commercial purposes, to secure the payment of indebtedness contracted in the management of the business.
2. **USE OF CORPORATE SEAL.**—A mortgage executed on behalf of a corporation by a duly authorized agent, and purporting to be under its seal, is not invalid because the seal attached is only a scroll, and not the regularly adopted corporate seal, since it is now settled that a corporate contract does not require a seal unless a similar contract, if made by an individual, would have to be sealed, and in such cases any convenient seal will accomplish the purpose.

From Tillamook: H. H. HEWITT, Judge.

Suit by C. Thayer and E. Thayer against the Nehalem Mill Company and Frank Patton to foreclose a mortgage executed to plaintiffs as trustees. Decree for plaintiffs, and defendant Patton appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Frank J. Taylor*.

For respondents there was a brief over the names of *W. W. Thayer, Claud Thayer, and Thos. H. Tongue*, with an oral argument by *Mr. Wallace W. Thayer*.

Opinion by MR. JUSTICE BEAN.

This is a suit against the Nehalem Mill Company and Frank Patton to foreclose a mortgage alleged to have been given by the defendant company on February 8, 1894, to the plaintiffs, as trustees, to secure the payment of certain sums due its employees and persons from whom it purchased material. The decree being in favor of the plaintiffs, defendant Patton appeals. The facts are that the Nehalem Mill Company is a corporation having its principal office at Astoria, Oregon. It was organized in 1891, to carry on a sawmill business and a general merchandise store in connection therewith at Nehalem, in Tillamook County, and was the owner of an undivided one half interest in the town site of Nehalem City. Owing to the topography of the country, communication was slow and difficult between the principal office of the company and the place where its mills were located. None of its directors or officers resided at the latter

place, but its business there was conducted entirely through a general manager. At a meeting of the board of directors held in Astoria on October 19, 1891, one H. E. Nelson was appointed general manager; and at a subsequent meeting, held January 20, 1892, a resolution was adopted investing him "with full power to manage and conduct the business of the corporation." In pursuance of this appointment, Nelson immediately entered upon his duties, and continued to act thereunder until February 27, 1894, during which time he bought logs and manufactured them into lumber, hired and discharged employees, sold the output of the mill, collected and disbursed the proceeds of the business, kept all the accounts, bought and sold merchandise, sold town lots, and, in fact, had entire and exclusive control and management of all the business of the corporation at Nehalem City. On February 8, 1894, the corporation was indebted to divers and sundry persons for logs and merchandise purchased and labor employed by Nelson in the conduct of its business, in the sum of \$2,965.88, which indebtedness was evidenced by sundry drafts drawn on it by the persons to whom the several amounts were due, and accepted by Nelson as the general manager. Finding himself unable to realize on shipments of lumber fast enough to pay these drafts as they matured, Nelson, for the purpose of securing the payment thereof, and to satisfy the holders, so that the company might continue in business, executed in the name and on behalf of the company a mortgage on its interest in the Nehalem town site, and on the lumber and logs then on hand to the

plaintiffs in this suit, as trustees, for the holders of the several drafts then outstanding. A short time thereafter, the company, having failed in business, conveyed and transferred all its property, both real and personal, to the defendant Frank Patton, in payment of its indebtedness to him, amounting to the sum of \$15,923. On June 13, 1894, this suit was commenced by the plaintiffs to foreclose their mortgage. Patton alone appeals, and his contention is that plaintiff's mortgage is void for want of authority in Nelson to execute it in behalf of the corporation, and because it is not sealed with the regularly adopted corporate seal.

1. Neither of these positions is, in our opinion, sound. Nelson was the agent and general manager of the company, with full power and authority, as declared in the order of his appointment, "to manage and control the business of the corporation." He was given the entire supervision and management of its affairs at Nehalem, and was empowered, therefore, to do whatever was usual and necessary for that purpose. None of the officers of the corporation resided at that place or gave any particular attention to the business there, but depended entirely upon Nelson to conduct it for them. As general manager, he had the unquestioned authority to sell the property described in plaintiff's mortgage, and apply the proceeds in payment of the drafts in question, and there is no reason, in our opinion, why he could not anticipate such sale by giving a mortgage thereon to secure the payment of said drafts. Under the circumstances, it was but an ordinary and necessary business transaction: *Hoyt*

v. *Thompson's Executor*, 19 N. Y. 216. An agent, the principal being absent, having full charge, management, and control of the business, "must necessarily," says Mr. Justice SCHOLFIELD in *German Fire Insurance Company v. Grunert*, 112 Ill. 75, "possess and exercise the same power and authority in the business that the principal could were he present; for, were it otherwise, the business, however well conducted, must soon terminate for lack of funds." And in *Taylor v. La-beaume*, 17 Mo. 338, it was held that such an agent of a lumber company, the members of which lived abroad, had authority to transfer lumber belonging to the company in trust to pay off the hands in its employ, the court saying: "We regard Perkins as possessed of all the powers of an owner in managing the mill. Good faith was all that could be exacted of him. There is no pretense that he did not act in a manner conducive to the best interests of the company. The sale of lumber he made to the plaintiff was required by the unpaid laborers at the mills, who, it seems, had confidence in him that he would pay them; and, but for this act, there must have been a total suspension of all operations, to the great detriment of the owners." So, also, in *Hoskins v. Swain*, 61 Cal. 338, such an agent, in the absence of his principal, borrowed money and assigned an account to the lender as security therefor. The defendants, when the account was presented to them for payment by the assignee, paid it in full. The point in the case was whether this constituted payment to the principal, and that depended upon the authority of the agent to assign the account as security. The court held the agent

had such authority, and put its decision on the ground that the principal had authorized him to act as general superintendent and manager of the business, which empowered him to do everything necessary, proper, and usual in the ordinary course of the business.

Upon the same principle, it was held in *Scudder v. Anderson*, 54 Mich. 122 (19 N. W. 775), that the manager of a mining company was presumably empowered to sell its personal property; and in *Carey Lumber Company v. Cain*, 70 Miss. 628 (13 So. 239), that the manager of a lumber company prima facie had authority to sell property of the corporation to pay debts contracted by him. Within the principle of these cases, we think Nelson had authority to execute the mortgage in suit. This is not the case of a general manager of a corporation in easy call of the principal officers making a mortgage upon the property to secure a loan, but is a transaction demanded by the exigencies of the situation, and, as we view it, was within the scope of his authority. Nor do we understand that the mortgage covers the machinery and property of the company used in carrying on the business for which it was organized, but only such property as it held for commercial purposes, and which Nelson had authority to sell and dispose of; and, therefore, the cases of *Stow v. Wy*, 7 Conn. 214 (18 Am. Dec. 99), and *Despatch Line of Packets v. Bellamy Manufacturing Company*, 12 N. H. 205 (37 Am. Dec. 203), holding that the general agent of a corporation cannot sell or mortgage, to secure a loan, the property used by the corporation in the conduct of its business, are not in

point in this discussion. We do not question the doctrine of these cases under their particular facts, but it has no application to the question now in hand.

2. It is also claimed that the mortgage is void because the regularly adopted seal of the company is not affixed thereto. The testamentum clause is as follows: "In witness whereof, the said corporation has this day hereunto set its hand and seal, by the hand of H. E. Nelson, its attorney in fact, this 8th day of February, 1894"; and is signed "Nehalem Mill Company. [Seal.] H. E. Nelson, Manager and Attorney in Fact." But the seal used was a scroll made with a pen, and not the regularly adopted seal of the company. It is settled that a corporation can only deed or mortgage its real property by an instrument under its corporate seal (*Eagle Mills Company v. Monteith*, 2 Or. 277; *In re St. Helen Mill Company*, 3 Sawy. 88, Fed. Cas. No. 12,222); but, as said by Mr. Chief Justice REDFIELD in *Bank of Middlebury v. Rutland Railroad Co.* 30 Vt. 169, "it was never supposed that if authority were shown from the corporation to attach their seal to the contract, that it was indispensable that use should be made of the ordinary common seal of the company. Any other seal would have the same effect if adopted by the company. And this is ordinarily established by showing authority to execute a contract on behalf of the company under seal, and the fact of attaching some seal to the name of the company with the intent to seal on their behalf. So that at present nothing more is requisite than to show the authority of the agent to contract on behalf of the company in the particular form; *¶. e.*, with a seal.

It was formerly supposed that a corporation could not enter into any contract except by attaching its ordinary corporate seal; but that doctrine originated at a time when the use of seals containing devices significant of the person or corporation to which they belonged was common, and, when affixed to an instrument, they were regarded as equivalent to a signing: Angell and Ames on Corporations, §§ 215, 216. Under these circumstances, it was, of course, important that a corporation, when executing a contract, should use its common or ordinary seal; and many English and some early American cases seem to hold that the rule still prevails. But it is not the established rule in the courts of this country. It is now settled here that a seal need not be attached to a corporate contract unless a similar contract, when made by an individual, would require a seal; and when a contract is required to be so executed, a corporation may adopt any seal which is convenient for the occasion, and is not confined solely to the use of its ordinary corporate seal: 1 Morawetz on Private Corporations, § 339; 2 Cook on Stock, Stockholders, and Corporation Law, § 722; 1 Devlin on Deeds, § 336; *Bank of Middlebury v. Rutland and W. Railway Company*, 30 Vt. 169; *Tenney v. East Warren Lumber Company*, 43 N. H. 343; *Johnston v. Crawley*, 25 Ga. 316 (71 Am. Dec. 173); *Porter v. Androscoggin Railroad Company*, 37 Me. 349; *Mill Dam Foundry v. Hovey*, 21 Pick. 428. If, therefore, we are right in our conclusion that Nelson had power and authority to execute the mortgage in suit, neither the defendant company nor its creditors can repudiate it for the want of the regularly adopted cor-

porate seal. It was suggested at the argument that this case was governed by the rule announced in *Jacobs v. McCalley*, 8 Or. 124; but that case is not in point here, because the mortgage in question does not provide the manner in which it may be foreclosed. It follows that the decree of the court below must be affirmed, and it is so ordered.

AFFIRMED.

[Decided August 9, 1897.]

CROASMAN v. KINCAID.

(49 Pac. 764.)

31	445
31	479

CLAIMS AGAINST STATE—APPROPRIATIONS FOR PAYMENT.—Hill's Ann.

Laws, § 3877, providing that all accounts for supplies for the penitentiary shall specify the items, be certified by the superintendent, and presented to the secretary of state, who shall audit the same, and issue warrants on the treasurer for their payment, etc., does not make an appropriation for the payment of the class of claims referred to, in view of article IX, section 4, of the state constitution, forbidding payments of money from the state treasury except in pursuance of appropriations made by law. The long continued construction of this provision has been that a legislative appropriation is referred to: *Shattuck v. Kincaid*, 31 Or. 379, applied.

MANDAMUS TO PUBLIC OFFICER.—An officer may be compelled by mandamus to exercise a discretion vested in him, notwithstanding that the court has no power to determine how he shall exercise it or to control his judgment.

MANDAMUS TO AUDIT CLAIMS.—Under Hill's Ann. Laws, §§ 2208, 3877, whereby the secretary of state is charged with the duty of determining claims against the state, mandamus will issue to compel such officer to pass upon an unliquidated demand for supplies furnished to the penitentiary, and to allow or disallow the same.

From Marion: H. H. HEWITT, Judge.

Mandamus by A. B. Croasman to compel Harrison R. Kincaid, secretary of state, to audit a claim. A demurrer to the writ was sustained, and plaintiff appeals.

REVERSED.

For appellant there was an oral argument by *Mr. Ralph E. Moody*.

For respondent there was an oral argument by *Mr. N. B. Knight*.

Opinion by MR. JUSTICE WOLVERTON.

This case was argued and submitted with the case of *Shattuck v. Kincaid*, just decided, 31 Or. 379 (49 Pac. 758), and upon the same briefs. The claim involved is one preferred against the state by plaintiff for supplies furnished at the instance and request of the superintendent of the state penitentiary, for the use of said institution, which are alleged to be of the reasonable value of \$20. The bill constituting the claim, was itemized and sworn to by the claimant, certified to as correct by the superintendent, and presented to the secretary of state with a request that he audit and allow the same and draw his warrant upon the treasury for the amount, which being denied, this proceeding was instituted to compel him to do so. A demurrer was interposed to the alternative writ of mandamus, and, being sustained, judgment was entered dismissing the proceedings, from which plaintiff appeals.

Section 3877, Hill's Ann. Laws, is pertinent to the inquiry here, and is as follows: "All accounts for supplies for the penitentiary or prisoners shall specify the items, and be certified to by the superintendent, and presented to the secretary of state, who shall audit the same and issue warrants on the treasurer for the payment of said claims, and no money shall be

paid for any purpose on account of said penitentiary except upon said warrants." The questions presented are (1) whether this section makes an appropriation of funds out of the treasury for the payment of the class of claims against the state contemplated thereby; and (2) whether, in case it does not effectuate an appropriation, the secretary can be required to audit the account and draw his warrant on the treasurer for the payment of the same.

We are satisfied that under the law, as ascertained and applied in the case of *Shattuck v. Kincaid*, 31 Or. 379 (49 Pac. 758), the section quoted does not constitute an appropriation of money in the treasury to the payment of the class of claims contemplated thereby, and this disposes of the first question.

Under the constitution, the secretary of state is the auditor of public accounts, and by law he is charged with the duty of superintending the fiscal concerns of the state, and it was no doubt because of the functions thus delegated to and pertaining to his office that the legislature referred to him claims of the class involved to be audited. We have seen (*Shattuck v. Kincaid*, 31 Or. 379, 49 Pac. 758), "that when the nature and amount of services rendered the state are definitely fixed and ascertained, and the compensation therefor is regulated by law, such as the salaries of public officers, the duty of auditing or allowing the account or claim for such services becomes a mere ministerial act, the performance of which may be required by mandamus." See cases therein cited. Such is not the case, however, when the duty is one which necessarily involves the exercise of discretion and judg-

ment, and mandamus will not lie to direct or control the decision or determination of the functionary to whom the discharge of such duty is confided; and this is so because it is the discretion and judgment of that functionary, not that of the court, which is to be exercised. But, while courts will not direct and control discretion and judgment, they will require its exercise, not with a view to any particular result, but that the officer shall proceed in the discharge of his duty, and determine matters proper for his cognizance, and declare, according to his own judgment, the result of his consideration: *Miller v. County Court*, 34 W. Va. 285 (12 S. E. 702); *State v. Oliver*, 116 Mo. 188 (22 S. W. 637); *Wailes v. Smith*, 76 Md. 469 (25 Atl. 922); *Burton v. Furman*, 115 N. C. 166 (20 S. E. 443); *State v. Doyle*, 38 Wis. 92; *People v. Board of Supervisors*, 26 Barb. 118; *Dechert v. Commonwealth*, 113 Pa. St. 229 (6 Atl. 229); *People v. Auditor*, 2 Colo. 97; Spelling on Extraordinary Relief, § 1459. But the remedy thus invoked must not be extended beyond its legitimate purposes, so as to take the place of a suit against the state by its consent to establish demands which are uncertain or unliquidated, and which properly fall within the legislative cognizance: *Swan v. Buck*, 40 Miss. 268, 291; *Rice v. State*, 95 Ind. 33.

Construing section 3877 with section 2208, Hill's Ann. Laws, whereby the secretary is charged with the express duty of examining and determining the claims of all persons against the state, it would seem that he is required to audit and allow or disallow claims of the nature involved here as well as those of a general

character, with this difference in the manner of proof only, that the certificate of the superintendent of the penitentiary is made a necessary adjunct to the presentation of the claim or demand. The plaintiff's claim is an unliquidated demand for supplies furnished the superintendent, and the secretary is required to determine the amount and validity thereof under the law and evidence, and this calls for the exercise of judgment such as the courts will not control, but they will, under the authorities, compel its exercise: *Wailes v. Smith*, 76 Md. 469 (25 Atl. 922). The issuance of the warrant in pursuance of section 3877 is made the direct and legitimate result of the auditing or allowance, and is to be considered as part of one and the same act, as under the general provisions, so that in the event of an allowance the warrant must issue. In the light of these considerations, the allegations of the complaint being admitted by the demurrer, it is manifestly proper that the secretary should exercise his discretion and pass upon plaintiff's claim, and, if allowed, draw his warrant therefor. The judgment of the court below will therefore be reversed, and the cause remanded with directions to overrule the demurrer.

REVERSED.

[Decided April 12, 1897; rehearing denied.]

SABIN v. WILKINS.*

(37 L. R. A. 465; 48 Pac. 425.)

VOID CHATTEL MORTGAGE.—In Oregon a chattel mortgage is void as against attaching creditors whenever it appears either upon the face thereof by extrinsic evidence that the mortgagor has been authorized to dispose of the property in the usual course of trade for his own benefit (*Orton v. Orton*, 7 Or. 478, and *Jacobs v. Ervin*, 9 Or. 52, approved), though the mortgage may be sustained where the mortgagor disposes of the property but accounts for the proceeds: *Currie v. Bowman*, 25 Or. 364, cited.

FRAUD—CONDUCT OF PARTIES.—A mortgage given originally as a security for a genuine debt may be rendered invalid by the subsequent action of the parties. Such will be the result whenever their mutual conduct enables the mortgagor to hinder and delay creditors in reaching property that is lawfully subject to their demands.

FRAUDULENT CONVEYANCE—BURDEN OF PROOF—PRESUMPTION.—A creditor assailing an apparently valid chattel mortgage of his debtor on the ground that by extrinsic agreement or subsequent contract unlimited power of disposition for his own use and benefit was conferred upon the mortgagor must establish his contention in that respect, the presumptions are against him; and the fact that the mortgage lessens the chances of the other creditors for realizing their claims in full does not of itself render the transaction fraudulent.

FRAUD—MORTGAGES.—A debtor in failing circumstances may in Oregon prefer one creditor over another in any manner that he may choose if he does not resort to a general assignment or to devices which being construed in unison may be regarded as equivalent thereto: *Sabin v. Columbia Fuel Company*, 25 Or. 15; *Jolly v. Kyle*, 27 Or. 86; *O'Connell v. Hansen*, 29 Or. 173; and *Iaman v. Sprague*, 30 Or. 321, approved and followed.

From Benton: J. C. FULLERTON, Judge.

Suit by Robert L. Sabin against S. N. Wilkins, Mary A. Wilkins, his wife, F. M. Johnson, his general assignee for creditors, and D. A. Osburn, sheriff of Benton County, to set aside a chattel mortgage to Mrs.

*NOTE.—With this case in 37 L. R. A. 465 is an extensive note considering the effect of insolvency statutes upon a mortgage or sale preferring creditors.—REPORTER.

Wilkins and the general assignment to Johnson on the ground that they were parts of a preconceived plan to assign with a preference. The plaintiff also seeks to have his attachment declared a first lien on the property of Wilkins. The facts are fully stated in the opinion. There was a decree as prayed, from which defendants appeal.

REVERSED.

For appellant there was an oral argument and a brief by *Mr. W. S. McFadden*, to this effect:

Every debtor has the right to prefer one of his creditors to another in the absence of a statute forbidding it. This preference may be given either by paying or securing the debt, and his creditors cannot on that account avoid or invalidate the payment or the security: *Williams v. Whedon*, 109 N. Y. 333 (4 Am. St. Rep. 460); *Patton v. Leftwich*, 86 Va. 421 (19 Am. St. Rep. 902, 6 L. R. A. 569); *Hage v. Campbell*, 78 Wis. 572 (23 Am. St. Rep. 422); *Mackie v. Cairns*, 5 Cow. 547 (15 Am. Dec. 477); *Kuykendall v. McDonald*, 15 Mo. 417 (57 Am. Dec. 212); *Hempstead v. Johnston*, 18 Ark. 123 (65 Am. Dec. 458).

The transfer by an insolvent debtor of all his property in actual payment of a pre-existing debt, though he have other creditors known to the transferee, is not fraudulent—and if there is no actual fraud in the transaction, such conveyance is valid against all other creditors: *Buffum v. Green*, 5 N. H. 71 (20 Am. Dec. 562); *Stover v. Herrington*, 7 Ala. 142 (41 Am. Dec. 86); *Milburn v. Beach*, 14 Mo. 104 (55 Am. Dec. 91); *Johnson v. McGrew*, 11 Iowa, 151 (77

Am. Dec. 137); *Witmer's Appeal*, 45 Pa. St. 455 (84 Am. Dec. 505); *Cooper v. First National Bank*, 40 Kan. 5 (18 Pac. 937); *Farwell v. Jones*, 63 Iowa, 316; *Kruse v. Prindle*, 8 Or. 163; *Marquam v. Sengfelder*, 24 Or. 2.

A debtor has the right to prefer his creditors and pay and secure those preferred; and he may by chattel mortgage prefer creditors if made in good faith to secure bona fide debts. And further, a mortgage by an insolvent of all his property to secure a bona fide debt, in contemplation of an assignment, is not invalidated by the deed of assignment the day following or the same day: *Gilbert v. McCorkle*, 110 Ind. 215 (11 N. E. 296); *South Carolina Loan Company v. McPherson*, 26 S. C. 431 (2 S. E. 267); *Stix v. Sadler*, 110 Ind. 254 (9 N. E. 905); *Davis v. Scott*, 22 Neb. 154 (34 N. W. 353); *Farwell v. Jones*, 63 Iowa, 316; *Perry v. Vezina*, 63 Iowa, 25; *Gallagher's Appeal*, 114 Pa. St. 353 (7 Atl. 237); *Burrill on Assignments* (6th ed.), pp. 450-3; *Bailey v. Manufacturing Company*, 3 Pac. 756.

Husband may prefer his wife over other creditors. He has a clear and undoubted right to pay her a just debt at any time in money or property, and a man may prefer an honest debt due his wife: *Cornell v. Gibson*, 5 Am. St. Rep. 605; *Smith v. Hardy*, 36 Wis. 417; 2 *Cobbey on Chattel Mortgages*, §§ 661-63, 777-78. No stronger proof is required to establish the relation of debtor and creditor between a husband and wife than in other cases; and the husband and wife have no legal advantage over or disadvantage with respect to other creditors. If a husband may prefer a stranger creditor he may prefer his wife, if she is a creditor: *Stewart on Husband and Wife*, § 45.

An agent may take or receive possession for and in behalf of the mortgagee, or the agent may hold possession for the mortgagee or pledgee, nor is it necessary that the property be removed from its former locality, etc.: *Cobbey on Chattel Mortgages*, §§ 508-10; *Currie v. Bowman*, 25 Or. 364; *Ephriam v. Kelleher*, 18 L. R. A. 604; *Pierce v. Kelley*, 25 Or. 95; *Re Fisher's Estate*, 25 Or. 64. See 38 Central Law Journal, 79.

For respondent there was an oral argument by *Messrs. Francis D. Chamberlain and Thomas G. Greene*, with a brief to this effect:

The chattel mortgage from S. N. Wilkins to Mary A. Wilkins is void, because given on a stock of merchandise, and the mortgagor was left in possession with full power of disposing of the goods for his own benefit: *Orton v. Orton*, 7 Or. 478 (33 Am. Rep. 710); *Jacobs v. Ervin*, 9 Or. 52; *Bremer v. Fleckenstein*, 9 Or. 266.

The assignment for benefit of creditors is void because it contains a preference in favor of Mary A. Wilkins—the assignment asserting that Mary A. Wilkins had a first lien on the stock of furniture for \$600 and interest, when no such lien existed: *Hill's Ann. Laws*, §§ 3173, 3187. (See also authorities cited under next proposition).

The assignment is also void because the chattel mortgage from S. N. Wilkins to Mary A. Wilkins and the assignment for benefit of creditors were parts of one transaction, and the two instruments were intended by S. N. Wilkins to operate as an assignment for benefit of creditors with a preference in favor of

Mary A. Wilkins: Hill's Ann. Laws, §§ 3173, 3187; *Stout v. Watson*, 19 Or. 251; *Hahn v. Salmon*, 20 Fed. (Or.), 801; *Daggett v. Herman*, 16 Fed. 812; *Kellogg v. Root*, 23 Fed. (Mich.), 525; *Freund v. Yaegerman*, 26 Fed. (Mo.), 812; *Sage v. Wyncoop*, 104 U. S. 319; *White v. Cotzhausen*, 129 U. S. 329; *Davis v. Harrington*, 55 Hun. 109; *First National Bank v. Bard*, 59 Hun. 529; *Abegg v. Bishop*, 66 Hun. 8; *Hardt v. Schwab*, 72 Hun. 109; *Holt v. Bancroft*, 30 Ala. 193; *Winner v. Hoyt*, 66 Wis. 68; *Richmond v. Mills*, 52 Ark. 30 (4 L. R. A. 413); *Livermore v. McNair*, 34 N. J. Eq. 478; *Hyman v. Barman*, 6 Wash. 516; *Preston v. Spaulding*, 120 Ill. 208; *Hide Bank v. Rehm*, 126 Ill. 461; *Hanford Oil Company v. Bank*, 126 Ill. 585; *Hartman v. Rogers*, 153 Ill. 143; *Berry v. Coutts*, 42 Me. 445; *Wilks v. Walker*, 22 S. C. 108 (53 Am. Rep. 706); *Austin v. Morris*, 23 S. C. 392; *Meinhard v. Strickland*, 29 S. C. 491; *Putney v. Friesleben*, 32 S. C. 492; *Perry v. Holden*, 22 Pick. 269; *Heinman v. Hart*, 55 Mich. 64; *Benham v. Haskins*, 79 Mich. 35; *Burrows v. Lehdorff*, 8 Iowa, 96; *Cole v. Dealham*, 13 Iowa, 551; *Van Patten v. Marks*, 52 Iowa, 518; *Van Horn v. Smith*, 59 Iowa 142; *Berger v. Varrelman*, 127 N. Y. 281 (12 L. R. A. 808); *Spelman v. Freedman*, 130 N. Y. 421; *McAllister v. Marshall*, 6 Binn. (Pa.), 338; *Miner's National Bank's Appeal*, 57 Pa. St. 193.

Opinion by MR. JUSTICE WOLVERTON.

This is a creditor's suit to set aside a chattel mortgage executed by the defendant S. N. Wilkins to his wife, Mary A. Wilkins, and also an assignment subse-

quently made by Wilkins to the defendant Johnson. Plaintiff's contention, comprehensively stated, is that the mortgage is void upon the alleged ground that the mortgagor was allowed to retain possession of the mortgaged property, and to sell and dispose of the same for his own use and benefit in the usual course of trade; and that the execution of the mortgage was part of a preconcerted scheme to effect a general assignment for the benefit of creditors, but with a preference to Mrs. Wilkins; and, hence, that the assignment is also void. The facts underlying the contention are, in brief, as follows: On January 13, 1894, the defendant Wilkins was the proprietor of a furniture store in Corvallis, and largely indebted to sundry creditors. The representative of the Portland creditors called upon him at noon of that day for the purpose of obtaining security for the payment of their demands, and he was led to believe that unless he made a satisfactory settlement they would attach. During the interview Wilkins gave a statement of his assets and liabilities, but concealed the fact that he was indebted to his wife. Going home to lunch shortly after, he told his wife of his financial condition, and the requirement of these creditors, and it was agreed that he would at once give her a chattel mortgage upon the stock of furniture to secure the payment of a note for \$600 executed by him to her August 1, 1892, and in pursuance thereof the mortgage was given and delivered to her, and filed in the clerk's office at fifteen minutes after three that afternoon. The representative remained in Corvallis until the 15th, when Wilkins went with him to Portland,

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avowedly for the purpose of effecting a settlement with those creditors, but in the meantime said nothing about the chattel mortgage he had given his wife, of which the creditors had no knowledge until the next day, the 16th, when the fact was disclosed through a mercantile agency. On the 17th Wilkins entered into a written contract with the plaintiff, acting in behalf of such creditors, by which he agreed to pay and plaintiff agreed to accept 75 cents on the dollar in full of such indebtedness, 25 per cent. payable in cash January 24, and the balance, or 50 per cent., in secured notes. On January 23, Wilkins wrote to plaintiff that it was impossible for him to comply with his agreement; on the 24th plaintiff caused the store to be attached, and on the 25th Wilkins made the assignment in question.

We will first consider the present status and legal effect of the chattel mortgage, and then the assignment. It has been decided in this state that when it appears, either upon the face of the mortgage or by parol evidence aliunde, that the mortgagee of personal property has given the mortgagor unlimited power and authority to dispose of the property in the usual course of trade, for his own use and benefit, the mortgage is void as to attaching creditors: *Orton v. Orton*, 7 Or. 478 (33 Am. Rep. 717), and *Jacobs v. Ervin*, 9 Or. 52. In the latter of these cases there was a separate agreement between the mortgagors and the mortgagees concurrent with the execution of the mortgage that the mortgagors should retain possession of the stock and sell the same as they had done before, for their own use in the usual course of business; and in

the former case the disposition of the mortgaged property by the mortgagor for his own use was permitted without any explicit agreement to that effect at the inception of the mortgage. In a later case (*Currie v. Bowman*, 25 Or. 364, 44 Am. & Eng. Corp. Cases, 662, 55 Pac. 848), it was held that a chattel mortgage is valid which by its terms permits the mortgagor to retain possession with power to sell, but which requires him to account to the mortgagee for the proceeds less expenses of sales. These cases indicate very fairly the policy and trend of the law in this state in so far as it is involved by the facts before us. The intent and purpose of the parties in giving and receiving a chattel mortgage is the test of its validity at its inception, but, as it is a thing capable of modification by subsequent agreement, either expressed or implied, by co-operative and wilful disregard of its terms and conditions, it is a prerequisite to its continuing validity that good faith and fair dealing be maintained toward those whose interests may be affected by it. A chattel mortgage given primarily for the benefit of the mortgagor is void as against creditors from the beginning (Hill's Ann. Laws, § 3053), but, if given bona fide, and the parties, by their subsequent treatment of it and the property covered by it, convert it into an instrument calculated to effectuate the same purpose, it is none the less fraudulent and void from the time such purpose is promoted. But where the mortgage has been seasonably and duly filed, want of good faith must be established by the party who attempts to overthrow it, as the presumption stands in favor of honesty and fair dealing.

The mortgage in question is in the usual form, perfectly fair on its face, and permits the mortgagor to retain possession of the property, but expressly forbids any sale or disposal of it or of any part thereof by the mortgagor; so that if there is any infirmity in the mortgage it must be sought for in some extraneous agreement or subsequent treatment of it by the parties, from which we may infer a disregard of its conditions to the hindrance or detriment of creditors.

The prior existence of the note, and that it was given for a valid demand, were practically conceded; but, if it were otherwise, we think the propositions are established by the proof. Mrs. Wilkins testified, in effect, that when the mortgage was given her husband told her that she could take charge of the store and run it until she got her money out of it; that two days later, and after her husband had gone to Portland, she did take charge of it by going in person to the store and notifying the clerk of the condition of affairs and assuming control. Thenceforth, and until the sheriff took charge on the 24th, she says she directed the management of the business, had charge of the receipts, and that they were disbursed only by her authority. When the sheriff attached, he found the clerk in charge, but Wilkins entered soon afterward, procured some keys from the back end of the store, and gave them to him. The clerk, however, had one key, and Mrs. Wilkins another. All the witnesses who pretend to know anything about it concur in the statement that Mrs. Wilkins was about the store nearly every day from Monday the 15th until the attachment, and sometimes brought her lunch for

noon and remained continuously until evening. After Wilkins returned from Portland, on the 17th or 18th, he was also about the store until the attachment, but there is no testimony tending to show that he sold anything from the store himself, or that he obtained or used the proceeds of any sales. The business sign was not changed, and, barring Mrs. Wilkins' presence, the store was apparently conducted as it had formerly been. The evidence shows an understanding between the parties that Mrs. Wilkins should take charge of the property notwithstanding the condition that the mortgagor should remain in possession, and it may be said to be fairly established that she did actually assume possession and control, with the consent of her husband, and that she so retained it until the attachment. To say the least, it has not been established that he was permitted, with the knowledge or tacit consent of Mrs. Wilkins, to conduct the business in the usual course, as he had done before, or to use or appropriate the proceeds of sales for his own use and benefit in disregard of the mortgage conditions. The creditors can only complain when the mortgage is executed or subsequently used as a shield for the special benefit of the mortgagor, and thereby hinders or delays due process of law in reaching the property and subjecting it to the payment of valid demands. The mere fact that it may lessen their chances of realizing their claims in full does not of itself render the transaction fraudulent, if the mortgage is otherwise fair, and so treated; but it is the erection of a false muniment, not intended to secure the mortgagee so much as to ward off and de-

feat just demands, that works the iniquity, and to avoid which the law affords a remedy. The mortgage must be held to be valid unless it in fact constitutes a part of the general assignment subsequently made.

This court has several times, and quite recently, decided that a person in failing circumstances may prefer one creditor above another, and this he may do in any manner that he may see fit, so long as he does not resort to a general assignment, or to devices which, being construed in unison, may be regarded as equivalent thereto, for the accomplishment of the purpose, and this may now be regarded as the settled law of the state: *Sabin v. Columbia Fuel Company*, 25 Or. 15 (42 Am. St. Rep. 756, 34 Pac. 692); *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999); *O'Connell v. Hansen*, 29 Or. 173 (44 Pac. 387); *Inman v. Sprague*, 30 Or. 321 (47 Pac. 826). If, however, the execution of the mortgage to Mrs. Wilkins is so inseparably connected with the act by which the general assignment was effected that they may stand together, and constitute in reality but one act or transaction, the assignment is void as creating a preference. The statute expressly provides that no general assignment made by an insolvent debtor for the benefit of creditors shall be valid unless made for the benefit of all, and in proportion to the amount of their respective demands: Hill's Ann. Laws, § 3173. The preferment of one or more of the creditors, while assuming to make such an assignment, is in violation of the statute, hence it is that the assignment must fail, because the act by which it is sought to accomplish the purpose is unlawful. Nor is an act in disregard of law any less a

violation thereof because accomplished by indirect or devious methods: See *Inman v. Sprague*, 30 Or. 321 (47 Pac 826), and *O'Connell v. Hansen*, 29 Or. 173 (44 Pac. 387).

In point of time, the instrument creating the assignment was executed twelve days later than the mortgage. This, however, is but a single circumstance attending the transaction. Before giving the mortgage, Wilkins told the Portland representative that if his property was attached he would have to make an assignment. While in Portland he told the creditors the same thing in purport, and again on the 24th, immediately prior to the attachment, he said that if the creditors would give him time, he could pull through, but if not, he would have to make an assignment; and it seems he constantly foreshadowed the assignment as a result which he would be compelled to bring about if pressed by his creditors. With reference to the mortgage, he said in Portland that he owed his wife the money, was afraid the creditors "meant to jump him," and that he thought she ought to be secured. Finally the attachment came, and then the assignment, and it is urged that Wilkins contemplated an assignment from the first, and that each step was but a pavement of the way to that end, and ought to be so considered. We cannot hold this, under the testimony; the threatened assignment, if such it may be termed, was always conditional, and made dependent upon the attachment of his property at the suit of his creditors, indicating that he had not formed a fixed purpose to assign unless the event happened, but it was evident that he intended to secure his wife in any event.

Suppose he had said in the first place, "I owe my wife, and I mean to give her a mortgage on my stock of furniture at once to secure her; but if the other creditors attach I shall assign." And suppose the creditors had then insisted upon the attachment, and Wilkins had made good his threat by executing the mortgage, and following the attachment with an assignment, it would be quite apparent that there would be a matured purpose to assign with a preference to his wife, because, being apprised of the fixed intention of the creditors, his mind would have come to rest upon the scheme which would have resulted in the assignment. But suppose the creditors had, notwithstanding the announcement of his purpose to secure his wife, continued negotiations for a settlement, and the parties had proceeded with good intentions to accomplish the purpose without the attachment, and had actually entered into an agreement to that end, could it be said that the execution of the mortgage would be a part of a scheme to assign with preference to the mortgagee. This is in effect what really happened. The creditors, with full knowledge of the execution of the mortgage, and cognizant of the fact that Mrs. Wilkins claimed a lien upon the stock for her security, entered into a contract of compromise and settlement with Wilkins, whereas they might have said, "No, we will attach, and if you assign we will break it up." The compromise agreement is entirely inconsistent with the idea of an assignment, and to our minds is conclusive against plaintiff's contention.

It is said that Wilkins did not intend to keep the

agreement, but we cannot conclude that such was the case with the light we have upon the subject. The fact is, he tried to make a similar arrangement for time with Walter Bros., one of the Portland creditors, only a few days prior to giving the mortgage, and before his wife was aware of his financial condition; so that we are led to believe that Wilkins did not conclude upon making a general assignment until the attachment on the 24th, and, therefore, that it is not void. The decree will, therefore, be reversed, and the complaint dismissed, with costs to defendants, and a decree here entered accordingly.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

FARRELL v. OREGON GOLD COMPANY.

(49 Pac. 576.)

1. JURISDICTION OF STATE COURTS OVER FOREIGN CORPORATIONS.—Section 516, Hill's Ann. Laws, which provides that no foreign corporation "is subject to the jurisdiction of a court of this state unless it shall appear or have an agency therein for the transaction of some portion of its business," means that, unless it voluntarily appears, such a corporation must be transacting in this state some part of its corporate business when the action is commenced to sustain the jurisdiction of local courts: *Aldrich v. Anchor Coal Company*, 24 Or. 32, approved.
2. FOREIGN CORPORATIONS—MANNER OF OBTAINING JURISDICTION.—In the absence of special provisions relating to service of process on foreign corporations, jurisdiction is obtained over them in like manner as over domestic corporations, and a return of service good as against the latter, will, under like circumstances be good against the former: *Aldrich v. Anchor Coal Company*, 24 Or. 32, approved.
3. SERVICE ON FOREIGN CORPORATIONS—RETURN ON PROCESS.—It is not necessary to the validity of a default judgment rendered against a foreign corporation that the return of the service of summons shall show that the defendant was at the time engaged in business in this state; though that is a jurisdictional fact, it need not appear in the sheriff's return, but may more appropriately appear elsewhere in the record.
4. SERVICE ON PRESIDENT OF FOREIGN CORPORATION.—A foreign corporation doing business in Oregon is subject to its laws, and hence, as

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there is no special law relative to service upon it, a service upon its president is prima facie sufficient, under section 55, Hill's Ann. Laws, though the return does not show he was authorized to represent the corporation.

5. PAPERS NOT PART OF THE JUDGMENT ROLL.—BILL OF EXCEPTIONS.—Papers filed in a law action other than those designated by Hill's Ann. Laws, § 272, subd. 2, as constituting the judgment roll, as for example, affidavits filed in support of a motion, cannot be considered by the appellate court unless they are properly incorporated in the bill of exceptions: *Scott v. Cook*, 1 Or. 25; *Oregonian Railway Company v. Wright*, 10 Or. 162; *State v. Drake*, 11 Or. 396; *Osborn v. Graves*, 11 Or. 526; *State v. Chee Gong*, 17 Or. 635, and *Van Bibber v. Fields*, 25 Or. 530, applied.
6. PAPERS IMPROPERLY IN TRANSCRIPT.—Papers that are not part of the judgment roll as defined by statute are not part of the transcript and will not be considered on appeal.
7. NECESSITY OF BILL OF EXCEPTIONS.—Whenever it is desired to review a finding of fact by a trial court based on evidence a bill of exceptions embodying the evidence is necessary to present the question to the appellate court, whether the exception to the ruling is taken orally or the ruling is deemed by law to have been excepted to: *Anteny v. Fairview Milling Company*, 10 Or. 390, distinguished.
8. SERVICE OF SUMMONS ON FOREIGN CORPORATIONS.—Under Hill's Ann. Laws, § 55, subdivision 1, the service of a summons on the president of a private corporation, either foreign or domestic, within the county where the cause of action arose will confer jurisdiction on local courts, regardless of whether that officer either resides or has an office within such county, for the president is "an agent" of his corporation within the meaning of the last part of said subdivision.

From Union: ROBERT EAKIN, Judge.

On July 22, 1895, J. R. Farrel commenced an action in the Circuit Court of Union County against the Oregon Gold-Mining Company, a Kentucky corporation, to recover the sum of \$6,511.50. In his complaint he alleges, among other things, that the "defendant is now, and has heretofore been, engaged in the business of owning, operating, and conducting mines, and a general quartz mining and milling business, in Union County, Oregon." It appears from the complaint that one of the causes of action is for ser-

vices rendered by plaintiff in Union County, as superintendent and agent of the defendant corporation, in and about the operation, working, and caring for its milling and mining properties in that county. A summons was regularly issued and served upon the defendant corporation by the delivery of a copy thereof, together with a certified copy of the complaint, to H. Walters, its president, in Union County. The defendant failed to appear and answer as required, and on October 7, 1895, judgment by default was rendered against it for the amount prayed for in the complaint. On the thirteenth of March following the defendant appeared specially, and moved the court to set aside and vacate the judgment, on the ground that the court had no jurisdiction of the corporation, which motion being overruled, the defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *J. D. Slater*, and *Cox, Cotton, Teal & Minor*, with an oral argument by *Messrs. Slater and Lewis B. Cox*.

For respondent there was a brief and an oral argument by *Messrs. Thomas H. Crawford and Frederick V. Holman*.

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

The motion to open the default and vacate the judgment in this case is based upon the ground that the judgment is void for the reason (1) that the sher-

iff's return is insufficient to warrant its entry, and (2) that the corporation was in fact not doing business in the state at the time the action was commenced, and that Walters, its president, upon whom service was made, was here on other business, and not as its representative.

1. In support of the first point it is contended that it is essential, in order to support the jurisdiction of the courts of this state to render a personal judgment by default against a foreign corporation, that it shall appear from the return of the service that the corporation was engaged in business in the state at the time the service was made, and that the agent upon whom it was made was authorized to represent the corporation here. But we cannot concur in this view of the law. It is quite true the statute provides that no foreign corporation shall be subject to the jurisdiction of the courts of the state in personam unless it appear in the action or have an agency established here for the transaction of some portion of its business: Hill's Ann. Laws, § 516. But this is only declaratory of the general rule that, in the absence of a voluntary appearance, the courts of one state have no jurisdiction over a corporation created in another, unless it is transacting some portion of its corporate business within the state where sued. And as a corporation can act only through its agents, it necessarily follows that if it is doing business in the state it must have an agency established here, within the meaning of the statute. In no other way can it do business, and hence the statute simply means that, in the absence of a voluntary appearance, no foreign corpora-

tion shall be subject to the jurisdiction of the courts of this state unless it is engaged in the transaction of some portion of its corporate business at the time the action is commenced; and this is the rule prevailing elsewhere: *Aldrich v. Anchor Coal Company*, 24 Or. 32 (41 Am. St. Rep. 831, 32 Pac. 756); 6 Thompson on Corporations, § 7995; 2 Morawetz on Corporations, § 980; *St. Clair v. Cox*, 106 U. S. 350 (1 Sup. Ct. 354); *Goldey v. Morning News*, 156 U. S. 518 (15 Sup. Ct. 559); *United States v. American Bell Telephone Company*, 29 Fed. 17; *Carpenter v. Air-Brake Company*, 32 Fed. 434.

So long as a corporation confines its operations to the state within which it was created, it cannot be subjected to the jurisdiction of a court of another state, where it has no office or transacts no business, by the service of process on some officer or agent while temporarily present in the latter state, because he cannot take the corporation with him beyond the jurisdiction of the state of its creation. But when it voluntarily goes into another state, and by the express permission or acquiescence of such state engages in the transaction of its corporate business, it is liable to be brought into the courts thereof by service of process upon such officer or agent as the local laws may designate, and the judgment founded thereon will be held good everywhere unless the mode of acquiring jurisdiction violates the principles of natural justice. In short, when a corporation migrates into another state, and engages in business there, it becomes, in effect, for jurisdictional purposes, a domestic corporation, and liable to suit upon a cause of action arising in the

state of its adoption by service of process in the manner provided for service on domestic corporations, unless the statute otherwise provides: 6 Thompson on Corporations, § 8019; *Insurance Company v. Carrugi*, 41 Ga. 660. A corporation of one state cannot do business in another without the consent of the latter, express or implied, and hence a state may impose, as a condition upon which a foreign corporation shall do business within its borders, that it accept as sufficient the service of process upon such officers or agents as may be prescribed. This condition may be implied as well as expressed. When, therefore, a state provides by general law that process may be served upon a private corporation by serving the same upon certain officers or agents thereof, and a foreign corporation subsequently comes into the state to do business, it will be deemed to have consented to subject itself to the jurisdiction of the local courts by the service of process upon the officers or agents designated in the local statute. Now, by the laws and policy of this state, foreign corporations are as free to engage in business therein as corporations of its own creation; but no special provision having been made for the service of process upon them (except certain corporations not necessary to be named), it may be made in like manner as upon domestic corporations, and a return thereof, good in an action against the latter, will, under similar circumstances, be good against the former.

3. As already suggested, the contention for the defendant is that the return is insufficient, because it does not show that the corporation was doing busi-

ness in the state at the time the service was made, or that Walters was an agent authorized to represent it here. The first objection is, we think, sufficiently answered by the opinion of Mr. Justice FIELD in the case of *St. Clair v. Cox*, 106 U. S. 350 (1 Sup. Ct. 354), in which it was said, in effect, that, in order to support the jurisdiction of the courts of a state to render a personal judgment against a foreign corporation, it must appear somewhere in the record, either in the application for the writ, or accompanying the service, or in the pleadings or findings of the court, that the corporation was engaged in business in the state; but, when the transaction of business by the corporations so appeared, "a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the community, that his duties were limited to those of a subordinate employee or to a particular transaction, or that his agency had ceased when the matter in suit arose." It does appear from the complaint in this case that the defendant corporation was engaged in business in the state at the time the action was commenced, and this was sufficient to support the jurisdiction of the court, within the rule laid down by Mr. Justice FIELD in the case referred to. And in the nature of things this must be so. The sheriff, as a ministerial officer, is neither required nor authorized to determine the question of jurisdiction and certify to his conclusion

in his return. He is charged with the duty of serving the process, and is required to certify to the fact of such service, and upon whom it was made, and then it remains for the court to determine, from the entire record, whether, under the service as made by him, it has jurisdiction of the person of the defendant. So that we think the objection to the validity of the judgment in question cannot be sustained on the ground that the sheriff did not certify that the defendant was doing business in the state at the time the service was made.

4. Nor do we think the return fatally defective because it does not show that at the time of service Walters was an agent authorized to represent the defendant in this state. It does show that he was the president of the defendant, and that the summons was served upon him in Union County; and, as it elsewhere appears in the record that the corporation was doing business in that county, this is a sufficient compliance with the provisions of section 55, Hill's Ann. Laws, prescribing the mode of service of process upon private corporations, and is *prima facie* sufficient to give the court jurisdiction. The statute referred to provides that, in an action against a private corporation, service shall be made upon the president or other head of the corporation, secretary, cashier, or managing agent, or, in case none of such officers shall reside or have an office in the county where the cause of action arose, then upon any clerk or agent of the corporation who may reside or be found in the county. The object of service of process is to bring notice home to the defendant, and hence

the statute contemplates that, in an action against a private corporation, service may be made upon the president or other head of the corporation, if it can be done within the county where the action is pending, and, if not, upon some subordinate agent. Such would be the rule in an action against a domestic corporation, and, as we have seen, the same rule applies to an action against a foreign corporation, when engaged in the transaction of business in this state. If a foreign corporation is not doing business here, service upon its president or other officer will, of course, not give the courts of the state jurisdiction of the corporation, because it does not accompany such officers into the state; but where the corporation itself has come into the state, and engaged in the transaction of its ordinary corporate business, service upon its president in the county where the cause of action arose is at least *prima facie* sufficient.

5. The other objection to the judgment is that the court was without jurisdiction because the defendant corporation was not doing business in this state at the time the action was commenced, nor was Walters, upon whom service was had, its agent or representative here. If the facts are as stated in this objection, the judgment is unquestionably void; for, as we have seen, the courts of this state cannot acquire jurisdiction over foreign corporations unless they are engaged in business here. But the plaintiff objects to the consideration of this question because the issue presented was one of fact, to be determined by the trial court from evidence dehors the record, and that such evidence is not a part of the record on this appeal, and

cannot, therefore, be considered by the court. Accompanying the transcript are a large number of affidavits which appear to have been filed in the court below, and which, it is claimed, contain the evidence upon which the issue in question was tried and determined; but they are not brought up by bill of exceptions, or in any way identified or made a part of the record by the trial court, and the contention for the plaintiff is that, for this reason, they cannot be considered on this appeal. The statute provides that, upon an appeal from a judgment, "the same shall be reviewed only as to questions of law appearing upon the transcript," etc. (Hill's Ann. Laws, § 543), and that the transcript is "a copy certified by the clerk of the roll or final record, or the pleadings, orders, papers, and journal entries that constitute such roll or record," etc.: (Hill's Ann. Laws, § 541). From these two sections of the statute it is clear that no questions can be considered on an appeal from a judgment except such as appear from the judgment roll; and, unless the affidavits referred to are a part of such roll, there is nothing before this court for consideration upon this point. Now, the statute defines a judgment roll, and, so far as applicable to the case in hand, it consists of the summons and proof of service, the pleadings, bill of exceptions, orders relating to the change of parties, together with a copy of the entry of judgment, and all other journal entries and orders in any way involving the merits and necessarily affecting the judgment: Hill's Ann. Laws, § 272, subd. 2. It is clear, therefore, that affidavits or other matters dehors the judgment roll as thus defined are no part of the record, and can

not be considered on appeal from the judgment, unless made so by a bill of exceptions; and so this court has uniformly held.

6. "No papers should be included in the transcript in any case," says THAYER, C. J., "except such as constitute the judgment roll or final record, or which have been made of record by being incorporated into a bill of exceptions. They cannot be considered for any purpose, and serve only to embarrass the court and counsel. We held in *Osborn v. Graves*, 11 Or. 526 (6 Pac. 227), in effect, that no paper not a part of the transcript, although certified as such, could be considered on the appeal. Because an exception need not be taken or allowed to any decision upon a matter of law, when the same is entered in the journal, or made wholly upon the matters in writing and on file in the court, does not preclude the necessity of making a statement of the exception. In such case an exception to the decision is deemed to have been taken. The law regards it as having been objected to, which constitutes an exception. But that is a mere challenge to the correctness of the decision. Whether it is erroneous or not depends upon facts. It is often necessary to show the circumstances under which it was made in order to prove it to be erroneous": *Mitchell v. Powers*, 16 Or. 491 (19 Pac. 647). And to the same effect are *Scott v. Cook*, 1 Or. 25; *Oregonian Railway Company v. Wright*, 10 Or. 162; *State v. Drake*, 11 Or. 396 (4 Pac. 1204); *State v. Chee Gong*, 17 Or. 635 (21 Pac. 882); *Van Bibber v. Fields*, 25 Or. 530 (36 Pac. 526). Indeed, a careful examination of authorities

has failed to disclose any case in which the court, on appeal from a judgment, has, under a statute similar to ours, ever reviewed the determination of the trial court, based on a mere question of evidence, unless the evidence upon which it acted has in some way been made a part of the record by such court, and the decisions are numerous where they have refused to do so. See 2 Enc. Pl. & Prac. 270, and note, for a collation of authorities; *Barber v. Briscoe*, 8 Mont. 214 (19 Pac. 589); *Fish v. Benson*, 71 Cal. 428 (12 Pac. 454); *Nash v. Harris*, 57 Cal. 242; *Aultman v. Howe*, 10 Neb. 8 (4 N. W. 357); *City of Plattsmouth v. Boeck*, 32 Neb. 297 (49 N. W. 167); *Fitzgerald v. Benadom*, 35 Neb. 317 (53 N. W. 72); *Development Company v. Nye*, 5 Wash. 301 (31 Pac. 752).

7. It is contended by the defendant that, the proceedings in this case having taken place after the rendition of judgment, and the decision having been made wholly upon matters in writing and on file in the court, the statute in reference to the judgment roll does not apply, and that no exception or bill of exceptions is necessary to entitle the affidavits to be considered on appeal. But this argument assumes, in the first place, that the decision was in fact made wholly upon matters in writing and on file in the court, without anything in the record upon which to base the assumption, and, second, that a bill of exceptions is only necessary when the rulings of the court are not deemed excepted to under the law. Neither of these positions is, in our opinion, sound. There is no law which we now call to mind requiring a motion to vacate a judgment based upon a question of fact

dehors the record to be determined by the trial court on affidavits alone, and it appears from the authorities cited that, when the ruling of the court is based upon a finding of fact from evidence, it makes no difference whether the exception is taken in person, or the ruling is deemed excepted to under the statute. The facts upon which it is made are no part of the record unless reduced to writing, and settled and signed as a bill of exceptions. The case of *Ankeny v. Fairview Milling Company*, 10 Or. 390, is to be distinguished from the case in hand, in that it was a special statutory proceeding for an order to abate a nuisance, and wholly independent of the original action. It follows that we cannot review the finding of the circuit court on the question of fact presented by the motion to vacate because the evidence upon which it was based is not properly here. The judgment of the court below must be affirmed, and it is so ordered.

AFFIRMED.

ON MOTION FOR REHEARING.

(50 Pac. 186.)

MR. JUSTICE BEAN delivered the opinion.

8. It is claimed that the return of service of the summons in the case at bar is fatally defective, because it does not show that Walters, president of the defendant, upon whom it was made, either resided or had an office in Union County at the time. Subdivision 1, § 55, Hill's Ann. Laws, provides that service of a summons in an action against a private corporation shall be made by delivering a copy thereof, etc.,

"to the president or other head of the corporation, secretary, cashier, or managing agent, or in case none of the officers of the corporation above named shall reside or have an office in the county where the cause of action arose, then to any clerk or agent of such corporation who may reside or be found in the county, or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent." The contention of the defendant is that under this section the service of summons upon the president of a corporation in the county where the cause of action arose and is pending is good only when none of the officers first enumerated in the statute reside or have an office in the county, and that service must be made upon some subordinate agent or clerk either residing or found therein. But as we understand the statute, its object is to provide for service upon such officers or agents of the corporation as will be most likely to bring notice home to the corporation; and therefore it contemplates that in all cases the service of summons in an action against a corporation must be made upon the principal officers enumerated in the statute, if they reside or have an office in the county where the action is pending, but, if not, it may, if the action is brought in the county where the cause of action arose, be made upon any clerk or agent of the corporation who may reside or be found in such county, without regard to his rank. The statute expressly provides that, if none of the principal officers reside or have an office in the county where the cause of action arose service may be made upon any clerk or

agent who may reside or be found in the county; and it would, we think, be a very technical construction to hold that the president of a corporation is not an agent, within the meaning of this section. That this is the proper construction of the statute seems manifest from its history and the object sought to be accomplished by it. Prior to 1876 service of summons in an action against a private corporation could only be made upon the president or other head of the corporation, secretary, cashier, or managing agent; but in that year the statute was amended by adding to the law as it then stood the language contained in subdivision 1 of § 55, after the words "managing agent," for the purpose, as stated by THAYER, J., in *Holgate v. Oregon Pacific Railroad Company*, 16 Or. 125 (17 Pac. 859), of making it convenient and proper to bring an action against a corporation in the county where the cause of action arose, without regard to the location of its principal office; and to this end the statute authorizes service of summons in such an action to be made upon any clerk or agent of the corporation residing or found in the county, in case none of the principal officers have an office or reside therein. This being so, the return in the case at bar is not, in our opinion, open to the objection made. The petition for rehearing discusses at much length other points in the case, but they are covered by the principal opinion. The petition is therefore denied.

REHEARING DENIED.

[Decided August 9, 1897.]

IRWIN v. KINCAID.

(49 Pac. 765.)

MANDAMUS—SECRETARY OF STATE—EXAMINATION OF CLAIMS.—Under Hill's Ann. Laws, § 2848, providing that the secretary of state shall cause to be printed blank assessment rolls and other forms; and § 2208, subdivision 7, requiring him to examine the claim therefor, and to draw his warrant for it, if correct,—mandamus will issue to compel him to act, but not to direct how or to what effect he shall act; since, in passing on the quality of the work and materials, reasonableness of the charge, etc., he must exercise his discretion and judgment: *Croasman v. Kincaid*, 31 Or. 445, applied.

From Marion: **HENRY H. HEWITT**, Judge.

Mandamus by the Irwin-Hodson Company to compel Harrison R. Kincaid, secretary of state, to audit a claim, and draw his warrant for it. From a judgment in favor of defendant, plaintiff appeals.

REVERSED.

For appellant there was an oral argument by *Mr. Ralph E. Moody*.

For respondent there was an oral argument by *Mr. N. B. Knight*.

MR. JUSTICE WOLVERTON delivered the opinion.

This case involves the question whether the secretary of state ought to be required to audit and allow and draw his warrant upon the treasurer for \$221.50, the amount of a certain claim in favor of plaintiff which is for ruling and binding thirty-three volumes of assessment and tax rolls and ruling recapitulation sheets, at the instance and request of the secretary.

He is authorized to incur the expense by section 2848, Hill's Ann. Laws, which is as follows: "The secretary of state shall from time to time, as he may deem proper, cause to be printed blank assessment rolls and other forms for proceedings required by this chapter, and shall transmit the same, together with such instructions as he shall think useful, to the several county clerks in this state, who shall distribute the same to the assessors of their several counties." The duty to examine and determine the claim and to draw his warrant therefor is imposed by section 2208, subdivision 7, discussed and construed in *Shattuck v. Kincaid*, 31 Or. 379 (49 Pac. 758), but the act required is one involving the exercise of discretion and judgment. He must satisfy himself touching the quality of the work and materials furnished, and determine upon the reasonableness of the charge, or whether in accord with the contract, if any. The writ of mandamus can therefore only require that he act in the premises, not direct how or to what effect he shall act, and is governed in all material concerns by the rules of law ascertained and applied in the case of *Croasman v. Kincaid*, 31 Or. 445 (49 Pac. 764), just decided, and the order will be the same here as in that case.

REVERSED.

[Argued October 20; decided November 8, 1897.]

MCLENNAN v. MCLENNAN.

(50 Pac. 802; 38 L. R. A. 863.)

DIVORCE—CONFLICT OF LAW.—A marriage contracted in another state by a resident of Oregon who has been divorced in this state by a decree from which there is yet time to take an appeal is absolutely void under Hill's Ann. Laws, § 503, providing that a divorce decree shall terminate the marriage, "except that neither party shall be capable of contracting marriage with a third person" until the expiration of the period allowed for an appeal.*

From Multnomah: LOYAL B. STEARNS, Judge.

Appeal by plaintiff from a decree of the Circuit Court of Multnomah County in favor of defendant in a suit brought to obtain a decree to declare void a marriage which had been contracted in alleged contravention to the provisions of the statute.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Stephen R. Harrington* to this effect:

A decree of divorce does not absolutely terminate the marriage relation, nor entirely free the parties from its obligation and liabilities until the expiration of the time allowed in which to take an appeal. A marriage before the expiration of six months from the rendition of the decree is absolutely void: *Conn*

* NOTE.—For a collection of authorities showing how the right to remarry is affected by a right to appeal from the divorce decree, see note to *Re Smith*, 17 L. R. A. 573. Generally, statutes forbidding the remarriage of parties guilty of adultery have no extraterritorial effect: See notes to *Phillips v. Madrid*, 12 L. R. A. 862; *Succession of Hernandez*, 24 L. R. A. 831; *Orill v. Smith*, 35 L. R. A. 223; *Crawford v. State*, 35 L. R. A. 224. There is an extended discussion of this question in *Pennepacker v. State*, 10 Am. St. Rep. 648 (2 L. R. A. 708).—REPORTER.

v. *Conn*, 2 Kan. App. 419; *Wilhite v. Wilhite*, 41 Kan. 154; *Re Smith*, 4 Wash. 702 (17 L. R. A. 573); 1 Bishop on Marriage, Divorce, and Separation, § 436; 2 Bishop on Marriage, Divorce, and Separation, § 1616; Nelson on Divorce and Separation, §§ 135, 568, 582a; *Thompson v. Thompson*, 114 Mass. 566; *Cook v. Cook*, 144 Mass. 163; *Pratt v. Pratt*, 157 Mass. 503 (21 L. R. A. 97).

A decree of divorce fixes the status of the parties—their “legal position in regard to the rest of the community”—and that status cannot be confined to the state in which the decree is rendered, but goes with the parties to any state or country to which they may temporarily or permanently remove: Nelson on Divorce and Separation, §§ 27 *et seq.*

For the State of Oregon there was an oral argument by *Mr. Thad. S. Potter*, with a brief over the names of *Cicero M. Idleman*, attorney-general, and *Charles F. Lord*, district attorney, to this effect:

The decree of divorce terminates the marriage relation: Hill's Ann. Laws, § 503.

The disqualification for marriage imposed by § 503, Hill's Code, upon the parties to a suit for divorce, has no extraterritorial effect: *Van Voorhis v. Brintnall*, 86 N. Y. 18 (40 Am. Rep. 505); *Thorp v. Thorp*, 90 N. Y. 605 (43 Am. Rep. 189); *Commonwealth v. Lane*, 113 Mass. 458 (18 Am. Rep. 509); *West Cambridge v. Lexington*, 1 Pick. 506 (11 Am. Dec. 231); *Putnam v. Putnam*, 8 Pick. 433; *Medway v. Needham*, 16 Mass. 157 (8 Am. Dec. 131).

MR. JUSTICE BEAN delivered the opinion.

On September 3, 1889, the plaintiff was divorced by the Circuit Court of Multnomah County from her then husband, and, in twenty-two days thereafter, while still a resident of and domiciled in this state, was married in Vancouver, Washington, to the present defendant, who was at the time also a resident and domiciled in Oregon. The plaintiff being advised that the latter marriage was premature and unlawful brought this suit to declare it void, which was decided adversely to her, and she brings the cause here by appeal. The sole question presented on the appeal is as to the validity of the Vancouver marriage, and its determination depends upon the construction of section 503 of our statute and its effect upon marriages solemnized in a neighboring state. By this section it is provided that "a decree declaring a marriage void or dissolved at the suit or claim of either party shall have the effect to terminate such marriage as to both parties, except that neither party shall be capable of contracting marriage with a third person, and if he or she does so contract, shall be liable therefor as if such decree had not been given, until the suit has been heard and determined on appeal, and if no appeal be taken, the expiration of the period allowed by this code to take such appeal." It is clear that a marriage in this state in violation of this section would be null and void, because by its provisions the parties are incapable of entering into such a relation within the time specified for the reason that the decree does not to that extent terminate the former marriage. The

statute, in effect, declares that such marriage shall, for that purpose, continue during the time in which an appeal may be taken from the decree, or, in case of an appeal, during the pendency thereof. Until the expiration of such time, the status of the parties, so far as the right to remarry is concerned, remains the same as if no decree had been rendered. For all other purposes the decree is full and complete, but, on grounds of public policy, the legislature has provided that pending an appeal from such decree,—if one be taken, and if not during the time in which it may be taken,—the parties shall be incapable of contracting marriage with a third person, and under this provision of the law neither of them has any more right to do so than if the decree had not been given. During that time the decree is suspended or inoperative to that extent, and both parties, without regard to their guilt, are utterly powerless to make a valid contract of marriage with a third person.

It will be observed that the statute declares that neither party to the decree shall be capable of contracting marriage with a third person during the time such decree is subject to review by an appellate tribunal, and not merely that it shall not be unlawful for them to do so. It goes directly to their ability or capacity to contract, and there is a distinction made in the books between the marriage of divorced parties declared by law incapable of remarrying and a marriage in violation of some statutory prohibition penal in its nature. In the one case the marriage is absolutely void, and in the other it is often held to be valid, although the party may be punished criminally

for violating the prohibitory statute. This distinction is very clearly pointed out by Judge CLARK in *Conn v. Conn*, 2 Kan. App. 419 (42 Pac. 1006). The obvious purpose and object of the statute is to enable either party aggrieved by a decree of divorce to have the same reviewed in an appellate court, and to that end it is provided that, pending such right, neither party shall be capable of doing an act which would render a reversal nugatory. A construction of the statute which would permit a marriage within the time limited would be not only contrary to its plain wording and evident intent, but would produce, in case of a reversal of the decree, the anomalous result of one person having two legal husbands or wives, as the case may be, at the same time, and polygamy be thus sanctioned by law. It was to prevent the confusion and uncertainty resulting from such a condition of affairs that the statute was enacted, and it must be given force and effect. The supreme court of the State of Kansas had occasion in *Wilhite v. Wilhite*, 41 Kan. 154 (21 Pac. 173), to construe this statute, and it was there held that a marriage contracted in this state within six months after one of the parties had been divorced from her former husband by a decree of one of the courts of this state (Oregon), was absolutely null and void. The opinion of Mr. Justice JOHNSTON in that case contains a very lucid and satisfactory discussion of this question. The same construction has been given to a similar statute in the State of Washington by the supreme court of that state: *In re Smith's Estate*, 4 Wash. 702 (17 L. R. A. 573, 30 Pac. 1059).

Indeed, it is not seriously contended that a mar-

riage contracted in this state within the prohibited time would be valid, but the contention is that as the marriage in question was solemnized in the State of Washington the plaintiff was freed from the restraint imposed upon her by the decree of divorce. The general rule is unquestioned that a marriage between persons sui juris, valid where solemnized, is valid everywhere, but this plaintiff having been previously married, and her former husband being alive, could not contract a second valid marriage anywhere unless the incapacity arising from her previous marriage had been at the time effectively and completely removed by a decree of divorce, and this was not the case at the time of the solemnization of the marriage between plaintiff and defendant, because the statute under which the decree was obtained provided that the divorce did not completely sever the tie of marriage so as to enable either to become a party to a new one until the lapse of a specified time after the decree, and her marriage was contracted in violation of this statute. This provision of the law is an integral part of the decree by which alone both the parties to a divorce proceeding can be relieved from the incapacity to marry, and the marriage by a person divorced in this state and domiciled here, in violation of its provisions, is a mere nullity when called in question in the courts of this state, although such marriage may have been contracted in another state: 1 Nelson on Divorce, § 135; 1 Bishop on Marriage and Divorce, § 436; *Warter v. Warter*, 15 L. R. (Prob. Div.), 152; *Chichester v. Mure*, 3 Swab. & T. 223. The rule announced in the case of *Commonwealth v. Lane*,

113 Mass. 458 (18 Am. Rep. 509), and *Van Voorhis v. Brintnall*, 86 N. Y. 18 (40 Am. Rep. 505), and other cases cited of similar import, is relied upon by the defense. The doctrine of these cases is that a statute prohibiting a marriage of the guilty party in a divorce proceeding, during the lifetime of the other, or except under certain conditions, does not render void the marriage of such person out of the jurisdiction of the state in which the decree was obtained. Upon this question there is some conflict in the authorities [*Pennegar v. State*, 87 Tenn. 244 (2 L. R. A. 703, 10 Am. St. Rep. 648, 10 S. W. 305); 5 Am. & Eng. Enc. Law (1st ed.), 841], but the obvious distinction between the question presented in the cases referred to and in the case at bar is that there the incapacity to remarry attached only to the guilty party. The decree of divorce absolutely terminated the marriage relation between the parties as effectually as if it had been dissolved by death. The innocent party was perfectly free to remarry at any time, and the restraint upon the other was imposed as a punishment, and was, therefore, penal in its nature, and as such held inoperative out of the jurisdiction where it was inflicted. The provision of our statute is not imposed as a punishment, nor is it penal in its character, but it applies to the innocent as well as the guilty; it goes to the capacity of either party to remarry within the prescribed time, and therefore the cases cited and the doctrine contended for have no application to the question in hand. We are clear, therefore, that plaintiff's marriage, having been contracted before the expiration of the time allowed by law in which to appeal from a

decree of divorce, is absolutely void, and the decree of the court below must be reversed, and it is so ordered.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

SABIN v. ANDERSON.

(49 Pac. 370.)

31	487
131	519
131	521

FRAUD.—A banker who, with knowledge of a debtor's insolvency, accepts from him sundry notes, nominally for collection, but issues a negotiable certificate of deposit for their face, with a secret agreement that the certificate shall not be transferred, and then clandestinely buys it in at a discount, is a trustee of the funds collected and is personally liable therefor to the judgment creditors of such debtor.

APPEAL — DEMURRER OVERRULED BY CONSENT.—A demurrer interposed in the court below and subsequently overruled by consent cannot be again urged on appeal, if the complaint is sufficient to support a verdict.

EQUITY JURISDICTION — STATUTORY CONSTRUCTION.—The right to prosecute in a court of equity a creditors' bill to uncover assets fraudulently conveyed, and to compel an accounting, was not superseded by the garnishment and attachment laws, since a legislative intention that it should be so superseded does not appear, and in the absence of such intent the jurisdiction of equity is not abrogated by the creation of a new legal remedy: *Sprinkle v. Wallace*, 28 Or. 201, applied.

ADEQUATE REMEDY AT LAW.—Garnishment and attachment statutes do not afford an adequate remedy at law to uncover assets fraudulently concealed, and to compel an accounting, for by their means the creditor cannot, as he can by a creditor's bill in equity, both unmask the fraud and prevent the disposal of the property during litigation.

ACCOUNTING BY FRAUDULENT GRANTEE — CREDITS.—A banker who knowingly received notes on deposit from a failing debtor, in pursuance of a scheme to defraud the creditors of the latter, and issued therefor a negotiable certificate of deposit, under an agreement that it was to be paid from the proceeds of such notes, will not, in a suit by creditors for an accounting, be credited with an amount secretly paid to get back such certificate, because he feared the debtor would transfer it.

From Umatilla: STEPHEN A. LOWELL, Judge.

Suit by Robert L. Sabin against Wm. Anderson and others to uncover assets alleged to have been fraudulently conveyed, and for an accounting. From a decree for the plaintiff, defendants appeal.

AFFIRMED.

For appellants there was an oral argument by *Mr. Robert J. Slater*.

For respondent there was a brief over the names of *Wm. F. Butcher*, and *Cox, Cotton, Teal & Minor*, with an oral argument by *Mr. Butcher*.

MR. JUSTICE WOLVERTON delivered the opinion.

In February, 1889, the defendants, William Anderson and D. B. Watson, were partners, and engaged in the mercantile business at Adams in Umatilla County, Oregon. About that time Watson sold his interest in the business, including the accounts, to Anderson, who assumed the payment of the firm's indebtedness, and continued the business until the early part of June, and in the meantime contracted other indebtedness. On July 5 the plaintiff, to whom had been assigned the claims of creditors of Anderson & Watson and of Anderson individually, began actions against them, in which writs of attachment were issued, and notices of garnishment served upon L. D. Lively and J. H. Bently, two of the defendants herein, who were doing a banking business as partners under the firm name of the Umatilla County Bank. Proceedings under the garnishment were three times set in operation to require them to

answer touching any property of Anderson and Anderson & Watson in their hands subject to garnishment, but were as many times dismissed upon their motion, and in neither instance did they come to trial upon the merits. The final dismissal was affected June 10, 1893, and four days thereafter judgments were given and entered against defendants in said actions, upon which executions were duly issued, and returned nulla bona, and it is alleged that all defendants are insolvent except Lively, who has property consisting of real estate and bank stock acquired largely with the proceeds of certain promissory notes transferred by Anderson to the Umatilla County Bank in fraud of plaintiff's assignors. This suit was instituted January 15, 1894, and the court below found that Lively & Bently had collected the notes, and were trustees of the funds derived therefrom, and entered a personal decree against them for the amount thereof, with accrued interest from the date of the collection. From this decree the defendants appeal.

The proof clearly discloses and establishes the following facts: Prior to June 18 and 24, 1889, Anderson was the owner of a large number of accounts, including those purchased from the firm of Anderson & Watson, for many of which he procured from the debtors their negotiable promissory notes. On June 18 Anderson went with a number of these notes, aggregating \$5,289.02, to the Umatilla County Bank, and it was then and there agreed between him and the proprietors of the bank that the bank should collect the notes, and account to Anderson for the proceeds thereof on November 20, 1889, or for the notes, if any

remained uncollected, for which services it was to receive a commission of 5 per cent. upon the amount collected. The bank, however, by its cashier, J. H. Bently, gave Anderson the ordinary cash certificate of deposit for a sum equivalent to said amount, negotiable in form, and made payable to the order of himself on the date last named. It was further agreed that this certificate should not be negotiated by Anderson, or, if he should negotiate it, that he should explain to the purchaser the real transaction and agreement between him and the bank touching the deposit and collection of the notes, and the manner in which the certificate should be redeemed by the bank. On the twenty-fourth day of June, Anderson deposited with the bank another lot of notes aggregating \$1,190.20, upon like conditions, and for which a like certificate was issued. Subsequently, but prior to the maturity of the certificates, the bank, becoming alarmed lest Anderson should transfer them to a bona fide holder, sent an agent to purchase them apparently for one E. De Peat, but in reality for itself, for which purpose the funds of the bank were used. The first certificate was secured November 16, for which the bank paid Anderson \$2,150, and the second December 5, for \$650. The testimony shows beyond peradventure that Anderson, at the time of the deposit of these notes with the bank, placed them there under the conditions above delineated for the purpose of concealing them and putting them beyond the reach of his creditors. It was stoutly contended, however, that the bank, or its proprietors, Lively & Bently, did not share with Anderson in such purpose, and that the transac-

tion upon their part was bona fide, and without knowledge of the insolvency of Anderson & Watson, or of the purpose or intent of the said Anderson in seeking and entering into such an arrangement or agreement with the bank. But we think Lively & Bently were particeps criminis with Anderson in the scheme to defraud his creditors. They allege in their answer that Anderson sold the notes to the bank, and that the bank gave the cash certificates of deposit as a consideration for their purchase. Mr. Lively, however, virtually admits by his testimony that the certificates did not express the real nature of the transaction. Soon after their issuance he endeavored to have them replaced by another, which he testified contained these words: "All unpaid notes indorsed by Anderson to be turned in as cash on this certificate when presented for payment," and assigned as a reason for his solicitude in securing the exchange that he, since the transaction, learned that Anderson had become insolvent, and hence that his indorsements upon the notes sold to the bank were of no value; and further explained that, "as all the unpaid notes should be turned in as cash, and they—the certificates of deposit—being transferable, and he not being responsible, we thought it better." He claims that the bank relied upon Anderson's indorsement to make it whole for any notes that should prove to be uncollectible, but the fact is that none of the notes, although many of them fell due prior to the maturity of the certificates, were ever protested for nonpayment, so as to hold Anderson, and no attempt of the kind was ever made, so far as the testimony discloses. These transactions are not

altogether in harmony with the idea of a direct purchase of the notes by the bank. But beyond this the plaintiff produced and put in evidence a copy of the certificate with which Mr. Lively endeavored to replace those first issued. Omitting date and signature, it is as follows, to wit: "William Anderson has deposited in this bank sixty-four hundred and seventy-nine & ~~2~~ dollars in notes for collection, payable to the order of himself on return of this certificate, properly endorsed, Nov. 20th, '89; all unpaid notes to be turned in as cash on this certificate when it is presented for collection. Not subject to check." And this is in accord with the real transaction as it was evidently understood between the parties, and as Bently admitted it to be prior to the severance of his relations with the firm of Lively & Bently. So we take it that the transfer of these notes to the bank was made by Anderson for the purpose of concealing and placing them beyond the reach of his creditors, and thereby to defraud them, and that Messrs. Lively & Bently were cognizant of his purpose, and participated in the scheme with intent to aid and assist him in its full accomplishment.

Two defenses are interposed. The first is that Lively & Bently were bona fide purchasers of the notes for value, without notice of Anderson's intended fraud, and this we have disposed of upon the evidence; and the second is that plaintiff has an adequate remedy at law by way of attachment, and hence that he cannot maintain the suit.

It was, however, also contended that the complaint does not state facts sufficient to constitute a cause of

suit. The record shows that a demurrer for that cause was interposed, but was overruled by consent of parties. The defendants thereupon answered, and no further objection was made to the sufficiency of the complaint until the trial in this court. Under these circumstances, if the complaint will support a verdict, it should stand; and we have no doubt of its sufficiency for that purpose.

It is urged that a creditors' bill will not lie to reach to the negotiable promissory notes of a debtor in the hands of a third person for the purpose of subjecting them to the payment of their claims and demands, but that question is not here for solution. The notes which were transferred by Anderson to the bank were all paid prior to the commencement of this suit, and the money collected thereon is all that Lively & Bently now have in their hands.

Was the plaintiff's remedy at law by attachment adequate? It may be premised that the defendants Lively & Bently claimed the ownership of these notes by purchase from Anderson, and that the latter had no interest in the proceeds thereof. It was not known to the plaintiff what amount of these funds Lively & Bently had in their hands, and an accounting was necessary, so that the jurisdiction of a court of equity to entertain a creditors' bill as it existed at common law was clear upon two grounds: *First*, to determine the nature of the transaction, whether it was intended as a fraud upon the creditors, and, *second*, to compel an accounting; and, unless this remedy is superseded by the one by attachment provided for by the statute, plaintiff is still entitled to invoke it. It is a rule of

law well established that where a new power is conferred upon the law courts, unless the statute conferring it contains negative words, or other language expressly taking away the pre-existing equitable jurisdiction, or unless the legislative intent to abolish the jurisdiction is clearly manifest from a consideration of the whole scope of the enactment, its reasonable construction, and its operation, the former jurisdiction of equity will continue unabridged: 1 Pomeroy's Equity Jurisprudence, § 279; *Sprinkle v. Wallace*, 28 Or. 201 (42 Pac. 487); *Union Passenger Railway Company v. Mayor*, 71 Md. 238 (17 Atl. 933); *Latham v. McGinnis*, 29 Ill. App. 152; *McNab v. Heald*, 41 Ill. 326; *Monroe v. Reid*, 46 Neb. 316 (64 N. W. 983); *Ludes v. Hood*, 29 Kan. 49. In such case the statutory remedy is regarded as cumulative, and the equitable dominion will continue as affording a concurrent remedy: *Sprinkle v. Wallace*, 28 Or. 201 (42 Pac. 487); *Heroy v. Gibson*, 10 Bosw. 591; High on Receivers, § 401; *Feldenheimer v. Tressel*, 6 Dak. 265 (43 N. W. 94). Without further elaboration, it is clear that the legislature did not intend, in providing for attachment and garnishment at law, to supersede the jurisdiction to uncover assets when transferred in fraud of creditors, and to compel an accounting.

Further than this, the remedy at law which will in any event preclude the equitable jurisdiction must be plain, adequate, and complete. It must be adapted to the particular exigency, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity: *McKinney v. Curtiss*, 60 Mich. 611 (27 N. W. 691); *Gullickson v. Madsen*, 87

Wis. 19 (57 N. W. 965); *Hodges v. Kowing*, 58 Conn. 12 (7 L. R. A. 87, 18 Atl. 979); *Fitzmaurice v. Mosier*, 116 Ind. 363 (9 Am. St. Rep. 854, 16 N. E. 175, and 19 N. E. 180); *Gormley v. Clark*, 134 U. S. 338 (10 Sup. Ct. 554); *Kilbourn v. Sunderland*, 130 U. S. 505, 514 (9 Sup. Ct. 594); *Warner v. McMullin*, 131 Pa. St. 370, 382 (18 Atl. 1056); *Henderson v. Johns*, 13 Colo. 280 (22 Pac. 461). But the remedy by attachment is not as efficient as by suit in the nature of a creditor's bill. In pursuing it in this case under the garnishment proceedings the plaintiff was confronted with the alleged sale of these notes, which was fraudulent as to him, and their collection, thus rendering an account necessary to determine what amount of the funds still remained in the hands of the garnishees. In such proceedings a personal judgment may be entered against the garnishee for the value of property of the debtor found in his possession, but the remedy against his disposal thereof in the meantime is not as efficient as in equity, where it may be taken into custody, especially after judgment and issue of execution and return nulla bona: *Hadden v. Spader*, 20 Johns. 554. In further illustration of the proposition, see *Pierstoff v. Jorge*s, 86 Wis. 128 (39 Am. St. Rep. 881, 56 N. W. 735); *Gullickson v. Madsen*, 87 Wis. 19 (57 N. W. 965), and *Feldenheimer v. Tressel*, 6 Dak. 265 (43 N. W. 94). True, in the present case the defendant had entered upon the prosecution of garnishee proceedings against Lively & Bently upon three different occasions, and had proceeded in one, and perhaps two, instances far enough to obtain their written answers to the petition for a citation requiring

their appearance, and to interrogatories subsequently served; but in neither instance did the matter come to trial upon its merits, and, in the view we have taken of the law, plaintiff was not precluded from pursuing his remedy in equity. Where the fraudulent grantee or donee has sold the property conveyed to him, or mingled it with his own, a decree will be rendered charging him personally with the value thereof, and he may be called upon to account for just what property has come into his hands: 5 Enc. Pl. & Prac. 601; *Dilworth v. Curts*, 139 Ill. 508 (29 N. E. 861).

But Lively & Bently contend that, in any event, they ought to have credit in the account for the \$2,800 which they paid to Anderson for the recovery of the outstanding certificates issued by the bank. The functions of a creditors' bill are to pursue a fund, or to restore a right lost by law, and not to visit the fraudulent grantee with damages. If a person has property of which he has obtained possession with a purpose to defraud the creditors of another, he is under no legal obligation to turn it over to such creditors, but, if he is honest, he will restore it to him to whom it belongs, that it may be applied in satisfaction of their demands, if wanted. Now, we presume that if such a person had honestly parted with what he fraudulently received, before the rights of the creditors are fixed by judgment and the filing of the bill, he ought to be exonerated from further liability: *Swift v. Holdridge*, 10 Ohio, 231 (36 Am. Dec. 85). But that is not what Lively & Bently have done in this instance. What they did was the result of their solicitude to protect themselves against the acts of

Anderson, and not to restore property held by them in fraud of creditors: *How v. Camp*, Walk. Ch. 427, is a case similar in principle, where lands had been conveyed in fraud of creditors, and the fraudulent grantee had disposed of a portion of them to bona fide purchasers, and paid a portion of the purchase money over to the fraudulent grantor. In taking the account the court refused to allow credit for the money thus paid over, and, discussing the case, the chancellor says: "This is not a case of constructive but positive fraud against creditors, in which the grantee is *particeps criminis*. When that is the case, the rule is not to allow the grantee, in taking the account, for any advances made to the grantor, as it would, to the extent of such allowance, be giving effect to the fraud, and remove the chief obstacle to third persons assisting debtors in defrauding their creditors, by indemnifying them against pecuniary loss in case of detection." SPENCER, J., in *Sands v. Codwise*, 4 Johns. 599 (4 Am. Dec. 305), says: "It would not become a court of equity to take a single step to save harmless a party detected in a fraudulent combination to cheat. No right can be deduced from an act founded in actual fraud." So it is here. This court, in the exercise of equitable jurisdiction, cannot take an account between the parties to the fraud for the purpose of reimbursing the fraudulent assignees for any money they may have expended for the sole protection of themselves without regard to the right of the creditors. The decree of the court below will be affirmed.

[Decided October 26, 1897; rehearing denied.]

PORTLAND UNIVERSITY v. MULTNOMAH
COUNTY.

(50 Pac. 532.)

1. **CORRECTING ASSESSMENT ROLLS—EXEMPTION FROM TAXATION.**—Hill's Ann. Laws, § 2782, giving county courts power to correct assessment rolls, make alterations in the description of lands, when it shall be necessary to render such description conformable to law, and make any other alterations or corrections in such roll "as it shall deem necessary to make the same conform to the requirements of this chapter," does not authorize the county court to strike property from the roll as exempt from taxation: *Oregon Steam Navigation Company v. Wasco County*, 2 Or. 206, followed.
2. **BOARD OF EQUALIZATION—EXEMPTION.**—Sections 2778 and 2779, Hill's Ann. Laws, empowering the board of equalization to increase or reduce valuations, to correct the assessment if property is assessed more than once, or in the name of a person not the owner, and to add to the roll property omitted by the assessor, do not authorize the board to determine whether property is exempt from taxation. The power of the board is limited to reviewing the assessments in the specified particulars.
3. **TAXATION—ACTION OF ASSESSOR.**—The action of an assessor in taxing property is not conclusive on the owner, and the question of fact whether it is exempt may be tried out in an appropriate proceeding.*

From Multnomah: HENRY E. MCGINN, Judge.

Petition by the Portland University to the County Court of Multnomah County for the exemption of certain lands from taxation after they had been assessed. From an order partially granting the relief asked plaintiff appealed to the circuit court and again appeals here.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Parrish L. Willis*.

*NOTE.—In support of this ruling see note to *McLean v. Jephson* (N. Y.), 9 L. R. A. 493.—REPORTER.

For respondent there was a brief and an oral argument by *Messrs. Chas. F. Lord*, district attorney, and *John H. Hall*.

MR. JUSTICE WOLVERTON delivered the opinion.

In the year 1895 the Portland University was the owner of a tract of land containing two hundred and fifty and one third acres, and the college buildings thereof, all which it is alleged was used and occupied for the purposes of the institution. The assessor of Multnomah County assessed all said tract to the plaintiff, and so returned the same upon the assessment roll to the board of equalization. Application was made to the board by petition, praying that said lands be stricken from the roll as exempt from taxation upon the ground that it was the property of a literary institution within the state, and actually occupied for the purposes for which it was incorporated. The board refused the prayer of the petition in toto, whereupon the plaintiff applied to the county court for the same relief, and the court struck from the roll sixty-seven and ninety-two one-hundredth acres of said tract as exempt from assessment and taxation, and refused to disturb the assessor's return as to the balance. From this action of the court the plaintiff prosecuted a writ of review to the circuit court, and, the writ having been there dismissed, it has appealed to this court.

1. It is contended that the county court has the power to correct the assessment roll by striking therefrom all the lands of plaintiff as exempt from assessment and taxation, and that such power is derived

solely from section 2782, Hill's Ann. Laws, which is as follows: "The county court of each county shall, at its term in September in each year, examine the assessment roll of its county, and shall have power to correct the same, make alterations in the description of lands or other property upon such roll, when it shall be necessary to render such description conformable to the requirements of this chapter; and may make any other alterations or corrections in such roll as it shall deem necessary to make the same conform to the requirements of this chapter." This section very early received a construction by this court in two cases to the effect that the power thus delegated pertained only to formal matters, such as correcting the description of lands or other property appearing upon the roll, and to such other formal alterations and corrections as should be deemed necessary to make the roll conform to the requirements of the chapter of which it formed a part at the date of its enactment: *Oregon Steam Navigation Company v. Wasco County*, 2 Or. 206; *Rhea v. Umatilla County*, 2 Or. 298. The powers pertaining to the board of equalization as now or then constituted were not given or conferred by such chapter, and hence it was held that the county court was not endowed therewith, and, although the powers and duties delegated to the board of equalization and section 2782 are now included in the same chapter by a later revision, the intention of the legislature at the time of the adoption of that section must govern; and the interpretation must be the same now as in those cases. We hold, therefore, that the county court was without the

power, under said section, to grant the prayer of plaintiff's petition, and that the circuit court was not in error in dismissing the writ of review.

2. This view necessarily affirms the judgment of the court below, but the respondent insists that the action of the board of equalization touching the exemption claimed is final, and conclusive upon the petitioner. Whether such board had power to act in the premises depends entirely upon the interpretation of sections 2778, 2779, Hill's Ann. Laws. By these sections boards of equalization are authorized "to examine and correct the assessment rolls of their respective counties, and to increase or reduce the valuation of property assessed, in the manner hereinafter provided," which is as follows: "If it shall appear to such board of equalization that there are any lands or other property assessed twice, or in the name of a person or persons not the owner thereof, or assessed under or beyond its actual value, or any lands, lots, or other property not assessed, said board shall make the proper corrections." Statutes conferring powers of the nature here under consideration are always to be strictly construed, and it is well settled that such powers can be exercised only when expressly or by necessary implication conferred by statute. To recapitulate, the board is empowered to increase or reduce valuations; to correct the assessment if property is assessed more than once, or in the name of a person not the owner; and to add to the roll property omitted by the assessor. In the enumeration of these powers we find none authorizing the board to determine whether property is exempt from assessment and taxation, or

to review the action of the assessor in passing upon that question. The board of equalization has jurisdiction, and is authorized by the powers thus delegated, to sit and act as a board of review to correct the work of the assessors in the particulars enumerated; but further it is not authorized to act. DEADY, J., says that, in his judgment, "this board is merely a part of the machinery of assessment. No relief can be had against a mere overvaluation of property incident to the infirmity of human judgment except by an appeal to it": *California Land Company v. Gowen*, 48 Fed. 771-775; see, also, *Dundee Investment Company v. Charlton*, 32 Fed. 192. And so it is with other corrections of the rolls which it is intrusted with the power to make. But where it is without jurisdiction or authority to act in the premises, it is useless to appeal to it for relief, as its orders pertaining thereto would prove absolutely nugatory, and of no avail.

3. Touching the assessor's authority, it appears that he has no jurisdiction to assess land or other property exempt from assessment and taxation, and his action in the premises in determining that it is not used or occupied so as to bring it within the exemption is not conclusive, the fact being one on which jurisdiction depends. The question as to whether property is assessable under the statute is jurisdictional, and therefore open to inquiry, whenever the authority to make an assessment is asserted, notwithstanding the assessor has exercised his judgment thereon: *McLean v. Jephson*, 123 N. Y. 143 (9 L. R. A. 493, 25 N. E. 409); *In re New York Catholic Protectory*, 77 N. Y. 342; *Illinois Central Railroad Company v. Hodges*, 113

Ill. 323; Black on Tax Titles, §§ 142, 147. The determination of these latter questions was not necessary to the decision in this case, but there arose a dispute between counsel at the hearing whether the writ of review had been prosecuted to review the proceedings of the board of equalization or those of the county court. From the deductions here made it is apparent that in either event the writ was properly dismissed by the lower court. Whether the county court has the power, in its capacity as fiscal agent of the county or otherwise, aside from that conferred by section 2782, to abate taxes or strike property from the roll for any cause to avoid the expense of litigation or escape unjust contribution to state taxes, we have not considered, as the question was not presented, and we do not wish to be understood as having passed an opinion thereon.

AFFIRMED.

[Decided August 2, 1897.]

HESS v. OREGON BAKING COMPANY.

(49 Pac. 808.)

31	503
38	22

EFFECT OF WAIVING PRELIMINARY EXAMINATION.—The waiver of a preliminary examination by one charged with a crime is equivalent to a finding by the committing magistrate that there is probable cause to believe the defendant guilty.

WAIVING EXAMINATION—EVIDENCE.—A finding on a preliminary examination that there is sufficient cause for holding the accused to answer is only prima facie evidence of probable cause on a trial for malicious prosecution, and may be overcome by competent evidence.

PLEADING—MALICIOUS PROSECUTION.—In an action for malicious prosecution an allegation in the complaint that there was no probable cause for the arrest is sufficient to authorize the admission of evidence of want of probable cause, notwithstanding a waiver by plaintiff of the preliminary examination in the criminal proceedings.

MALICIOUS PROSECUTION—INSTRUCTION AS TO PROBABLE CAUSE.—In an action for malicious prosecution, if the facts are undisputed, the court must declare as a matter of law whether they constitute probable cause; but if the evidence is conflicting the case must go to the jury with instructions that if certain facts exist there was or was not probable cause: *Gee v. Culver*, 12 Or. 233, approved.

ACTION FOR MALICIOUS PROSECUTION—GOOD FAITH.—Any citizen who in good faith causes the arrest of one whom he has good reason to believe has violated the law will be protected in an action for malicious prosecution, although the action proves unfounded.

ADVICE OF PROSECUTING OFFICER.—One who in good faith seeks the advice of a prosecuting officer about the commencement of a criminal prosecution and discloses to him all the facts and circumstances within his knowledge or which he has reasonable ground to believe, relating to the offense, and is advised by such officer to institute the prosecution, has probable cause for so doing, if he acts in good faith upon such advice even though there were other exculpatory facts which he might have ascertained by diligent inquiry.

From Clackamas: THOMAS A. McBRIDE, Judge.

Action by Elizabeth Hess against the Oregon German Baking Company (a corporation), and Theodore H. Liebe to recover damages for malicious prosecution. The cause having been removed from Portland to Oregon City for trial, plaintiff recovered judgment for \$9,250, from which this appeal was taken.

REVERSED.

For appellants there was a brief over the names of *Cake & Cake*, and *Bronaugh, Fenton, McArthur & Bronaugh*, with an oral argument by *Messrs. Harry M. Cake and William D. Fenton*.

For respondent there was a brief over the name of *McGinn, Sears & Simon*, with an oral argument by *Messrs. Henry E. McGinn and Nathan D. Simon*.

MR. JUSTICE BEAN delivered the opinion.

This is an action to recover damages for malicious prosecution, and comes here on an appeal from a judgment in favor of plaintiff. In the complaint it is averred that the defendant Liebe falsely, maliciously, and without probable cause charged the plaintiff in a criminal information before a magistrate with the crime of larceny, upon the hearing of which she waived an examination, and was bound over to appear before the grand jury, which body returned an indictment indorsed "Not a true bill," and she was thereupon discharged, and her bail exonerated. It is contended that the complaint does not state a cause of action, because it appears therefrom that, when the plaintiff was brought before the magistrate, she voluntarily waived a preliminary examination, which it is claimed was practically a confession or acknowledgment that there was probable cause for her arrest. There does not appear to be any provision in the law for the waiver of a preliminary examination by a person accused of a crime before a magistrate, although it is quite a common, and no doubt unobjectionable, procedure. Its effect, however, can be nothing more than an admission that there is sufficient cause for holding the accused to answer, and this is the only result which could flow from an examination. In other words, the waiver of an examination is tantamount in law to a finding by the magistrate that there is sufficient cause to believe the defendant guilty, and the authorities are substantially agreed that such a finding is not conclusive, but only prima

facie, evidence of probable cause, which may be overcome by competent evidence on the trial, and that an allegation in the complaint of a want of probable cause is a sufficient averment for the admission of such proof: *Louisville Railway Company v. Hendricks*, 13 Ind. App. 10 (40 N. E. 82), and authorities there cited. This being so, the complaint is not open to the objection made.

It is next claimed that the court erred in instructing the jury that the waiver of an examination is not of itself conclusive evidence of the existence of probable cause, but "is a single fact to be weighed by the jury for what it, under all circumstances, appears to be worth in determining that question." The objection to this instruction is that it assumes the question as to whether probable cause has been shown to be one of fact, to be determined by the jury, and not of law, for the court; and this seems to have been the view of the trial judge as indicated by his general instructions. After defining probable cause, and giving an unusually clear and accurate statement of the law as to when it would be a defense to an action of this character, the court concluded its charge upon the subject as follows: "If therefore you find that the defendant had reasonable ground to believe and suspect that the plaintiff was guilty of larceny, or had knowingly received the avails of the larceny committed by another, and was assisting such other to secrete such avails, with the view to place them beyond the reach of the owner, and that, acting on such belief, he instituted the proceedings complained of, your verdict should be for the defendant." This instruction nec-

essarily involved the submission to the jury of the question of probable cause. There is no distinction between the existence or nonexistence of a reasonable ground of belief, and the existence or want of probable cause. The difference is one of expression only, and not of substance. The existence of reasonable grounds for believing a charge to be true is nothing more than probable grounds for making it. And, in determining whether the defendant had reasonable grounds to believe the plaintiff guilty, the jury must necessarily decide whether or not there was probable cause for instituting the prosecution. The charge of the court, therefore, was nothing more than defining probable cause, and permitting the jury to determine whether the facts which they might consider to be proved were within or without that definition.

The point for decision, then, is whether the question of probable cause in an action for malicious prosecution is one of fact, to be submitted to the jury, or of law, to be decided by the court. The decisions upon this question are not entirely uniform, but we think the great weight of authority is to the effect that in this class of actions the question of probable cause is a mixed one of law and fact, in the sense that the facts, when in controversy, are to be determined by the jury, but whether they constitute probable cause is for the court. "No rule of law is better settled, both in England and in America," says Mr. Thompson, "than that in civil actions for damages for the malicious prosecution of a criminal action the question of probable cause is a question of law, which the judge must decide, upon established or conceded facts,

and which it is error for him to submit to the jury": 2 Thompson on Trials, § 1613. And Mr. Newell says that "what facts, and whether particular facts, constitute probable cause, is a question exclusively for the court. What facts exist in a particular case when there is a dispute in reference to them is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause. These rules involve an apparent anomaly, and yet few, if any, rules of the common law rest upon greater unanimity or strength of authority": Newell on Malicious Prosecution, 277. In *Panton v. Williams*, 2 Adolphus & Ellis, 169, 42 English Common Law Reports, 622, decided in 1841, where the question was elaborately examined both by counsel and the court, TINDAL, C. J., reviewing the earlier authorities, at length concluded that, in cases of this character, whether the facts which are relied upon to show probable cause are true or not is a question for the jury, but whether they constitute probable cause is a question wholly for the court. "There have been some cases in the later books," he said, "which appear at first sight to have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury; but, upon further examination, it will be found that, although there has been an apparent, there has been no real, departure from the rule. Thus, in some cases, the reasonableness and probability of the ground for prosecution has depended, not

merely upon the proof of certain facts, but upon the question whether other facts which furnished an answer to the prosecution were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not. In other cases the inquiry has been whether, from the conduct of the defendant himself, the jury will infer that he was conscious he had no reasonable or probable cause. But in these and many other cases which might be suggested it is obvious that the knowledge, the belief, and the conduct of the defendant are really so many additional facts for the consideration of the jury; so that, in effect, nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury, while at the same time they have received the law from the judge,—that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable or probable ground for the prosecution, or the reverse. And, such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made

out to their satisfaction. But it is equally certain that the task is not impracticable; and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them."

In a great majority of the American states the same rule has been adopted, and it is held to be the duty of the court to determine, as a matter of law, whether a given state of facts, when conceded or established, no matter how numerous or complicated, constitutes probable cause for instituting a criminal prosecution. Whether the facts and circumstances alleged to show probable cause are true and exist is, of course, a question of fact, and, when controverted, must be determined by the jury, but whether, supposing them to be true, they amount to probable cause, is a question of law. If none of the facts are in dispute, the court must decide the question without the intervention of a jury; but, if the case cannot be so decided, it must go to the jury with instructions from the court that certain facts, if found by them to exist, do or do not constitute probable cause; or, as put by WALDO, C. J., in *Gee v. Culver*, 12 Or. 233 (6 Pac. 776), "the judge must say to the jury: 'I tell you, if you think so and so, there is a want of reasonable and probable cause.'" In short, the jury must determine the facts if controverted, but not their legal effect. "What facts and circumstances amount to probable cause is a pure question of law; whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court, and the latter for the jury,"

says the Supreme Court of Massachusetts in *Stone v. Crocker*, 24 Pick. 84. "Probable cause is in the nature of a judgment to be rendered by the court upon a special verdict of the jury," says Judge HARRISON in *Ball v. Rawles*, 93 Cal. 227 (28 Pac. 938, 27 Am. St. Rep. 174), "and is not to be rendered until after the jury has given its verdict upon the facts by which it is to be determined. It is not, however, necessary that the facts be found by the jury in the form of a special verdict. The court may instruct them to render their verdict for or against the defendant, according as they shall find the facts designated to it which the court may deem sufficient to constitute probable cause. But it is necessary for the court, in each instance, to determine whether the facts that they may find from the evidence will or will not establish that issue. Neither is it competent for the court to give to the jury a definition of probable cause, and instruct them to find for or against the defendant, according as they may determine that the facts are within or without that definition. Such an instruction is only to leave to them in another form the function of determining whether there was probable cause. The court cannot divest itself of its duty to determine this question, however complicated or numerous may be the facts. It must instruct the jury upon this subject in the concrete, and not in the abstract, and must not leave to that body the office of determining the question, but must itself determine it, and direct the jury to find its verdict in accordance with such determination. The court should group in its instructions the facts which the evidence tends to prove, and then instruct the

jury that, if they find such facts to be established, there was or was not probable cause, as the case may be, and that their verdict must be accordingly."

Without further elaboration of this question or further special reference to the authorities, it is sufficient to say that, under the adjudged cases, it is generally the duty of the trial court, in instructing juries in cases of this character, to apply the law to the facts by telling them whether the facts which the evidence tends to establish, if found by them to exist, will or will not constitute probable cause for the prosecution, leaving to the jury only the question as to the existence of such facts, and that it is error to define probable cause in general terms, and to submit to the jury the question as to whether the facts in the particular case do or do not come within such definition. The credibility of the evidence, and what facts it proves, are for the jury; but whether such facts do or do not constitute probable cause is a question exclusively for the court. The court should therefore, by means of a hypothetical instruction, group the facts which the evidence tends to prove, and instruct the jury that, if they find such facts to have been established, they must find that there was or was not probable cause: 2 Thompson on Trials, §§ 1618, 1629, 1630; 2 Greenleaf on Evidence, § 454; *Ball v. Rawles*, 93 Cal. 222 (27 Am. St. Rep. 174, 28 Pac. 937); *Driggs v. Burton*, 44 Vt. 124; *Wilson v. Bowen*, 64 Mich. 133 (31 N. W. 81); *Bulkeley v. Smith*, 2 Duer, 261; *Masten v. Deyo*, 2 Wend. 424; *Bulkeley v. Keteltas*, 6 N. Y. 384; *Besson v. Southard*, 10 N. Y. 236; *Stewart v. Sonneborn*, 98 U. S. 187; *Atchison Railroad Company v. Watson*, 37 Kan. 773 (15

Pac. 877); *Cole v. Curtis*, 16 Minn. 182; *Burton v. St. Paul Railway Co.* 33 Minn. 189 (22 N. W. 300); *Smith v. Munch*, 65 Minn. 256 (68 N. W. 19); *Brooks v. Bradford*, 4 Colo. App. 410 (36 Pac. 303, 14 Cent. Law J. 82); *Emerson v. Cochran*, 111 Pa. St. 619 (4 Atl. 498, and note). This rule is peculiar to this class of actions, but is one of long standing, and founded upon sound reason, good authority, and public policy. Actions to recover damages for malicious prosecution have never been favored in law, although they have been readily upheld when it is shown that the prosecution was instituted through actual malice, and without probable cause. Malice in such cases is always a question for the jury, but as the authority to institute a criminal prosecution, and the extent of such authority, are derived from the law, the law must judge as to what will constitute probable cause therefor.

The welfare of society imperatively demands that those who violate the law shall be promptly and speedily punished, and, to accomplish that purpose, the rule has been firmly established that any citizen who has good reason to believe that the law has been violated may cause the arrest of the supposed offender; and if, in doing so, he acts in good faith, the law will protect him against an action for damages, although the accusation may in fact be unfounded. This rule is founded on grounds of public policy to encourage the exposure of crime and the punishment of criminals, and when, therefore, the act of a citizen in thus enforcing the law is challenged, the court must determine the question, when the facts are admitted or

established, as to whether he had probable cause for so doing, and not leave it to the arbitrament of a jury. Because this rule of law was not followed in the submission of the case under consideration, it must be reversed, and a new trial ordered, although the instructions as actually given by the court are unobjectionable and a lucid statement of the law, in view of the theory upon which the case was submitted by the trial judge.

One of the defenses relied upon was that, before instituting the criminal prosecution against the plaintiff upon which this action for damages is founded, the defendant in good faith sought the advice of the proper district attorney, and made to him a full and fair statement of all the facts and circumstances bearing on the case within his knowledge or belief, and was advised by that officer that there was sufficient cause for instituting the prosecution, and that he acted upon such advice. Upon this question the court charged the jury that "where a party has communicated to the district attorney all the facts bearing on the case of which he has knowledge or could have ascertained by reasonable diligence and inquiry, and has acted upon the advice received, honestly and in good faith, the absence of malice is established, the want of probable cause is negatived, and the action for malicious prosecution will not lie. But he must act in good faith, and fairly state the substance of all the material information he has in his possession in relation to the fact of the alleged crime." Objection is made to this instruction because, under the rule therein announced, in order to shield himself by

showing that he acted on the advice of the district attorney, the defendant was required to show that he disclosed to that officer, not only all the facts bearing on the guilt or innocence of the plaintiff within his knowledge or belief, but also such facts as he could have found out by reasonable diligence and inquiry. The instruction in question is substantially in the language of Newell on Malicious Prosecution (p. 310), and is an expression to be frequently found in judicial opinions, but is probably a little broader than the authorities warrant when the defense relied upon is that the defendant, in instituting the prosecution, followed and acted upon the advice of the public prosecuting officer. The rule seems to be that where one seeking in good faith the advice of a public prosecuting officer about the commencement of a criminal prosecution, discloses to such officer all the facts and circumstances within his knowledge, or which he has reasonable ground to believe, relating to the offense, and is advised by that officer to institute the prosecution, his defense of probable cause will be established if he acted in good faith upon such advice, even though there were other exculpatory facts which he might have ascertained by diligent inquiry. He is bound to make a full and fair disclosure of all the material facts within his knowledge; and, if he has reason to believe that there are other facts bearing upon the guilt or innocence of the accused, he must either disclose that belief to the prosecuting attorney, or himself make inquiry to ascertain the facts in relation to the matter, but more than this he is not required to do. He is not required to institute a blind inquiry to

ascertain whether facts exist which would tend to the exculpation of the party accused. If he honestly believes that he is in possession of all the material facts, and makes a full, fair, and candid statement of them to the prosecuting officer, and acts in good faith on the advice of that officer, he ought to be protected. See the following authorities, to which reference is made for a fuller discussion of this question: *Newell on Malicious Prosecution*, 318; *Johnson v. Miller*, 69 Iowa, 562 (58 Am. Rep. 231, 29 N. W. 743); *Dunlap v. New Zealand Insurance Company*, 109 Cal. 365 (42 Pac. 29); *Schippel v. Norton*, 38 Kan. 567 (16 Pac. 804).

There are several other assignments of error discussed in the brief of counsel, but, as they will probably not arise on another trial, they will not be considered at this time.

REVERSED.

[Decided at PENDLETON July 31, 1897.]

MATLOCK v. BABB.

(49 Pac. 373.)

1. CREDITORS' BILL—GARNISHEE PROCESS.—The general equitable remedy by creditors' bill is not taken away or superseded by the statutory proceeding of garnishment: *Sabin v. Anderson*, 31 Or. 487, followed.
2. CREDITORS' BILL—SUPPLEMENTARY PROCEEDINGS.—A judgment creditor's remedy by a suit in equity in the nature of a creditors' bill to uncover assets fraudulently concealed is not superseded by the statutory provision for proceedings supplementary to execution conferred by Hill's Ann. Laws, §§ 308–312. This latter seems to be particularly designed to reach property which still remains under the control of the debtor.
3. ADEQUATE REMEDY—EQUITY JURISDICTION.—Where several defendants separately claim an interest in or a portion of property sought to be reached by the plaintiff an equitable proceeding by creditors' bill is the only adequate remedy, since in no other single suit can all disputes

touching the title be settled, and hence supplementary and garnishment proceedings have not taken the place of the long established chancery suit.

4. CREDITORS' BILL—LIEN OF GARNISHMENT.—A judgment creditor by the issue of an execution and a levy thereunder acquires a sufficient lien upon property alleged to have been fraudulently conveyed for the purpose of defeating payment of his claim, to base a creditors' suit upon, although he has not exhausted his remedy at law or had the execution returned nulla bona: *Dawson v. Sims*, 14 Or. 581, and *Hahn v. Salmon*, 20 Fed. 806, followed.

FROM UMATILLA: STEPHEN A. LOWELL, Judge.

On or about the seventeenth day of April, 1896, the plaintiff W. F. Matlock recovered a judgment in the Circuit Court of the State of Oregon for Umatilla County against the defendant W. H. Babb upon an indebtedness that had accrued prior to January 1, 1892, for the sum of \$1,870.53 and \$25 costs and disbursements, and on December 19, 1896, recovered a second judgment in the same court against him for the sum of \$2,304 and \$26.40 costs and disbursements. Writs of execution were duly issued thereon, and under the one issued upon the first judgment the sheriff levied upon sixty-eight head of cattle by taking them into his possession, and upon some thirty-two head additional by the process of garnishment served upon the defendants R. S. Perkins, G. W. Hunt, and G. W. Ingalls, in whose possession they were at the time of the levy, all as the property of Babb. The sheriff, by virtue of the other writ, subsequently levied upon the same property in like manner. Concerning these cattle the plaintiff alleges, in substance, that about January 1, 1892, W. H. Babb was, ever since has been, and now is the owner thereof; that about December, 1893, he leased them to one Peter Schwab, but that in

reducing the agreement to writing he used the name of his wife, Hannah N. Babb, one of the defendants herein, as lessor, and caused the same to be signed by her as such; that Babb caused said lease to be so executed for the purpose of deceiving his creditors, and particularly the plaintiff, and to hinder and delay the collection of their just demands; that thereafter the said Hannah N. Babb, for the purpose of hindering, delaying, and defrauding said creditors, and for the further purpose of cheating and defrauding the said W. H. Babb, made a pretended transfer of the cattle to said Perkins, and that he accepted the said transfer with like intent and purpose; that said pretended transfer was without any good or valuable consideration, and was accepted by Perkins with full knowledge that said property belonged to Babb. It is further alleged that the defendants Hunt and Ingalls claim some interest, right, or title in and to said cattle, but that such right or interest, whatever it might be, is inferior and subordinate to the rights of plaintiff; that all the defendants are insolvent, and that Babb has no property other than the cattle out of which to make the amount of the executions; and that Perkins, Hunt, and Ingalls threaten to sell and dispose of the cattle now in their possession, and appropriate the proceeds to their own use, to the irreparable injury of plaintiff. A demurrer was interposed to the complaint in behalf of Perkins, Hunt, and Ingalls, and Hannah N. Babb, which being overruled by the court, and a decree given and entered in favor of plaintiff, these defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Messrs. A. D. Stillman and John C. Leasure.*

For respondent there was a brief and an oral argument by *Messrs. John J. Balleray and James H. Raley.*

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The appellants insist that the complaint is insufficient for two reasons: *First*, that it shows plaintiff has an adequate remedy at law under the process of garnishment; and, *second*, that the facts stated do not entitle plaintiff to maintain a creditors' suit in aid of an execution at law, and, incidentally, that it fails to show the plaintiff had exhausted his remedy at law, or that he had procured a return nulla bona upon his executions. In support of the affirmative of the first question it is argued that the remedy by creditors' bill in equity is superseded by the garnishee process and by the proceedings supplementary to execution. In so far as it pertains to such process under a writ of attachment, we have just decided, in *Sabin v. Anderson*, 31 Or. 487 (49 Pac. 870), that the equitable jurisdiction ordinarily asserted by means of the creditors' bill is not superseded thereby, and that, where garnishee proceedings have not been invoked to the extent of obtaining a trial upon the merits, a creditors' bill will lie to uncover property transferred for the purpose of defrauding creditors and for an accounting. It is therefore unnecessary to discuss the question further here.

2. But this case involves the further question as

to whether the proceedings supplementary to execution have superseded the equitable jurisdiction, and to this the same answer must be given. The statute provides, in effect, that after the issuance of an execution, and upon proof to the satisfaction of the court or judge thereof that the judgment debtor has property liable to execution which he refuses to apply towards the satisfaction of the judgment, he may be required to appear and answer under oath concerning his property; and, if it appear that he has any property subject to execution, the court or judge may make an order directing him to apply the same in satisfaction of the judgment, or the property may be levied upon and sold as provided by law. The court or judge may also make an order restraining the debtor from in any manner disposing of his property in the meantime, and for disobedience thereof he may be punished for contempt: Hill's Ann. Laws, §§ 308-310. Section 311 provides another means for procuring the attendance of the judgment debtor for examination, and section 312 gives the remedy by garnishment, and this is all there is of the proceeding supplementary to execution. Aside from the provision for the garnishee process, none of these sections provide a way to reach third persons who may be holding the debtor's property, and in league with him, to deprive the creditor of the benefit of his execution; and, indeed, they seem to have been intended to uncover assets or property which are within the possession or under the control of the debtor only, and in this respect the provisions therein for supplementary proceedings can in no sense take the place of

a creditors' bill. The case of *Feldenheimer v. Tressel*, 6 Dak. 265 (43 N. W. 94), is much in point. SPENCER, J., speaking for the court, says: "We cannot assume that the legislature intended to take from creditors any of the remedies that they enjoyed under the court of chancery for the enforcement of their judgment after having exhausted their remedy at law, and turn them over to the often inadequate and imperfect remedy provided by the statute in regard to proceedings supplementary to execution. Upon reason and authority the remedy by creditors' suit exists now as it formerly did under the Code of Chancery." In support of this view, see *Bennett v. McGuire*, 58 Barb. 625; *Burt v. Hoettinger*, 28 Ind. 217, and *Monroe v. Reid*, 46 Neb. 316 (64 N. W. 983).

3. There is an additional reason beyond those assigned in *Sabin v. Anderson*, 31 Or. 487, why the garnishee proceeding is not as effectual, when applied to the case at bar, as the creditors' bill. It is disclosed by the complaint that Perkins, Hunt, and Ingalls are all claiming a portion of this property, or an interest therein, not jointly, but severally, so that one proceeding would probably not settle all dispute touching the title, whereas by the creditors' bill this end may be accomplished. See, in this connection, *Pierstoff v. Jorge*s, 86 Wis. 128 (39 Am. St. Rep. 881, 56 N. W. 735), and *Gullickson v. Madsen*, 87 Wis. 19 (57 N. W. 965).

4. In support of the contention that the facts stated do not entitle the plaintiff to maintain a creditors' suit in aid of the executions, it is urged that as a foundation of such a suit there must exist an actual lien upon the property which is the subject

of the contest, and that an attachment which is acquired by the garnishment of third persons having the possession thereof does not fill the requirements necessary to constitute such a lien. That the suit will lie to set aside an incumbrance or a transfer of property made to defraud creditors in aid of an execution at law, there can be no controversy: 2 Beach on Modern Equity Jurisprudence, § 924. If, after securing his lien by the issuance of an execution and a levy thereunder, the creditor is compelled to come into a court of equity for the purpose of removing the obstruction fraudulently interposed to prevent the ample execution of the writ, he may do so immediately after he has obtained his lien by such levy, and, the obstruction being removed, he may proceed to sell the property under the execution, and subject the proceeds thereof to the payment of his judgment. Neither is he required, in such a case, to exhaust his remedy at law, or to have an execution returned nulla bona, before he can resort to equity. The lien itself gives the equitable right to have the fraudulent transfers and incumbrances swept away, that the execution may operate effectively to transfer the better title, and produce the larger returns for the judgment creditor: *Vanderpool v. Notley*, 71 Mich. 422 (39 N. W. 574). The rule is distinctly stated in *Tappan v. Evans*, 11 N. H. 327, as follows: "Where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to a levy or sale removed, he may file a bill as soon as he has obtained a specific lien upon the property, whether the lien be obtained by attachment, judgment, or the issuing of an execution.

But, if the property is not subject to levy or sale, or if the creditor has obtained no lien, he must show his remedy at law exhausted by an actual return upon his execution that no goods or estate can be found (which is pursuing his remedy at law to every available extent), before he can file a bill to reach the equitable property of the debtor." This rule was approved by Judge DEADY in *Hahn v. Salmon*, 20 Fed. 806. And it has been held by this court that an attachment lien before judgment is a sufficient foundation upon which to invoke the equitable jurisdiction to remove fraudulent impediments which may stand in the way of laying hold of the property, and applying it to the payment of the demands of attaching creditors: *Dawson v. Sims*, 14 Or. 561 (13 Pac. 506). Now, the property of a debtor in the hands of a third party is levied upon by execution in like manner as the same may be attached (subdivision 4, § 283, Hill's Ann. Laws), and where property is levied upon or attached in the hands of a third person, and he has given a certificate as required, the officer may, in the further execution of the writ, take the property wherever he can find it, and sell and apply it in satisfaction of such writ: Hill's Ann. Laws, §§ 284, 285. Such a levy, it would seem, places the property in custodia legis. Mr. Wade, in his work on Attachments (section 331), says: "Supposing the property in the hands of the garnishee to be attachable, and the property attached by the proceeding taken for that purpose, he thereafter holds it subject to the judgment. Thenceforward the property is in the custody of the law, and the garnishee becomes its legal custodian." To the

same effect, see, also, Drake on Attachments, § 453; *Renneker v. Davis*, 10 Rich. (S. C.) Eq. 289. The very purpose of the levy by garnishment, as well as by actual seizure, is to create a lien, and thereby charge the property with the payment of the debt. The priority of levy gives a superior right, as it respects other attaching creditors and all subsequent purchasers and incumbrancers, and upon principle there is no sufficient reason why such a lien should not support a creditors' bill in aid of an execution at law. The case of *Sabin v. Mitchell*, 27 Or. 66 (39 Pac. 635), was supported and the suit maintained upon a like lien, although the question raised here was not directly decided. We think the lien is sufficient to support the equitable remedy sought to be invoked. It follows that there was no error in overruling the demurrer, and the decree of the court below will therefore be affirmed.

AFFIRMED.

[Argued July 15; decided August 2, 1897.]

NORTHUP v. HOYT.

(49 Pac. 754.)

APPORTIONMENT OF MONEYS TO STATE TAXES.—The "moneys" referred to in section 2813, Hill's Ann. Laws, requiring county treasurers to pay over to the state treasurer in gold and silver coin the amount of state taxes charged to their respective counties out of the first of "such" moneys collected and paid in to them, means not only the proceeds of the tax levied for state purposes but also the proceeds of the taxes for general county purposes. That expression, however, does not include the result of any taxes levied for specific objects,—such as schools or roads.

STATUTORY CONSTRUCTION.—When a constitutional provision prevents a statute from applying to certain persons or in certain cases where it

apparently was intended to apply, the courts will not declare the statute unconstitutional but will hold that it was not intended to apply to such persons or cases.

STATE TAX A CORPORATE OBLIGATION OF COUNTY.—The obligation of a county to pay its portion of the state tax creates the relation of debtor and creditor between the county and the state, and the state becomes a preferred creditor to the amount of such tax, payable out of the general fund.

From Multnomah: E. D. SHATTUCK, Judge.

Mandamus proceeding by H. H. Northup, a taxpayer of Multnomah County, to compel Ralph W. Hoyt, county treasurer, to publish a notice calling in certain warrants for redemption. The particulars of the dispute are stated in the opinion. Defendant appeals from a peremptory order requiring him to publish the notice demanded.

MODIFIED.

For appellant there was a brief over the name of *Whalley & Muir*, with an oral argument by *Mr. John W. Whalley*.

For respondent there was a brief and an oral argument by *Messrs. Henry H. Northup*, in pro. per., and *Edward W. Bingham*.

MR. JUSTICE BEAN delivered the opinion.

By section 2465 of Hill's Ann. Laws, as amended in 1893 (Laws 1893, p. 59), the treasurer of each county is required to give notice, by publication in some newspaper printed or circulated in his county, that there are funds in his hands to redeem outstanding warrants indorsed, "Not paid for want of funds,"

whenever he has as much as \$1,500 belonging to the county fund. On the eleventh day of June, 1897, the treasurer of Multnomah County had on hand \$74,-514.86 to the credit of the general county fund, and \$6,776.71 belonging to the road fund of his county, levied and collected under the provisions of section 4085, and, refusing to give such notice, this proceeding was commenced to compel him to do so. As a defense thereto he avers that there was at the time a balance of \$157,661.67 due and owing from his county on the state taxes apportioned to it for the year 1896, which, under section 2813, he is required to pay in full before applying any of the moneys on hand to the payment and redemption of county warrants, and the sole question presented to the court for its decision is the proper construction of that section. It reads as follows: "On or before the first Monday of February in each year the several county treasurers in this state shall pay over to the state treasurer, in gold and silver coin, the amount of state taxes charged to their respective counties, which tax shall be paid out of the first of such moneys collected and paid in to the county treasurer; *provided, however*, that so far as the time of payment to the state treasurer is concerned, the same shall not apply to the county treasurers of the counties of Wasco, Umatilla, Baker, Union, Grant, Jackson, Coos, Curry, and Josephine, but the treasurers of said counties shall be required to pay over to the state treasurer on or before the first Monday of April in each year." The contention for the plaintiff is that this section contemplates that the payment by the county treasurer on account of state taxes charged

to his county shall be made from the moneys collected on the levy for state purposes only, and that any other construction thereof would be violative of section 3, article IX, of the constitution, which declares that "every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

Section 2813 comprises the entire act of October 21, 1864, and is amendatory of section 46 of the territorial act of 1854 (Laws 1855, p. 441), which required the county treasurer of each county in the territory to pay over to the territorial treasurer, in gold and silver coin, the amount charged to his county "out of the first moneys collected" and paid into the county treasurer. Aside from the use of the word "state" for "territory," the act of 1864 only changed the latter section by inserting the phrase "of such" before the word "moneys," so as to make it read, "out of the first of such moneys collected," and in extending the time for the payment of state taxes by certain counties. It is conceded that, as the law stood prior to the act of 1864, its language is broad enough to require the treasurer to pay the state taxes out of the first moneys collected and paid into the county treasury, without regard to the purpose for which they were collected. But the contention is that, by using the words "of such" between the words "first" and "moneys" in the amendatory act, the legislature intended that such payment should be made from the moneys collected for state purposes only, but this seems to be a strained construction of the statute. What office, if any, the words "of such" were designed to perform is not by any means evident, unless, as is

very probable, it was to render more certain the necessity of paying the state taxes in gold and silver coin, and to settle the contention then prevailing as to the right to pay such taxes in treasury notes. See *Whiteaker v. Haley*, 2 Or. 128. But, however this may be, the section referred to requires the county treasurer of each county to pay over to the state treasurer by a certain time the entire state tax apportioned to and charged against his county, and it would be absurd to say that the legislature expected such payment to be made only from the money collected on account of what is commonly denominated the "state tax," when, in the very nature of things, it could not all be collected and paid into the treasury by the date named. Certainly, if an entire change in the policy of providing state revenue had been intended by the amendatory act of 1864, it would have been clearly expressed, and not left to mere inference and conjecture. The evident purpose of the amendatory act was to extend the time for the payment by certain counties of the state taxes charged against them, and not to change the fund out of which such payments should be made.

But we are unable to concur in the contention of the defendant that the payment of the state taxes charged against his county is to be made from the first moneys collected for taxes and paid into the county treasury, regardless of the purpose or object for which they were collected. The constitution declares that every law imposing a tax shall state the object of the same, to which only it shall be applied (section 3, article IX); and under this constitutional provision moneys received by taxation for one purpose cannot be law-

fully diverted by the legislature to any other purpose: *First National Bank v. Barber*, 24 Kan. 534; *Doty v. Ellsbree*, 11 Kan. 209. Thus moneys derived from a tax levied in pursuance of law for a specific object, as for the support of the common schools (section 2593, Hill's Ann. Laws), or for laying out, opening, or making and repairing county roads (section 4085 Id.), and the like, cannot lawfully be applied in payment of the amount due from the county to the state, any more than it could be applied to the payment of any other general obligation of the county. When the law declares the object for which a specific tax is levied, the constitution prohibits the application of the money derived therefrom to any other purpose, and, under the settled principles of construction, the moneys derived from such tax are as fully and effectually excepted from the operation of section 2813, Hill's Ann. Laws, as if the statute had contained an express provision to that effect. "The rule of construction universally adopted is," says the Supreme Court of New Hampshire," "that when a statute may constitutionally operate upon certain persons, or in certain cases, and was not evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that courts are bound to presume that the legislature did not intend to violate the constitution." Opinion of the Justices of the Supreme Judicial Court, 41 N.

H. 555; see, also, End. Int. St., § 179; *Clark v. Mayor, etc., of Syracuse*, 13 Barb. 40; *Commonwealth v. Butler*, 99 Pa. St. 535. It is therefore from the first moneys received, constitutionally applicable to the payment of state taxes, from which such taxes are to be paid, and not from funds derived from a tax which the county is authorized to levy or collect for some special object.

Now, the general scheme of assessing and collecting taxes in this state creates the relation of debtor and creditor between the county and state for the amount of state revenue apportioned to the county, so that it becomes a liability against the county in its corporate capacity, payable out of the funds received for general county purposes, the same as any other obligation: *State v. Baker County*, 24 Or. 141 (33 Pac. 530). And all taxes levied for state and county purposes, when collected, belong to the county, and the state becomes a preferred creditor to the amount of the state revenue apportioned to it. So that while, for convenience, the rate of taxation included in the general county levy for the special purpose of raising money with which to pay the county's obligation to the state is designated as a state tax in the law and upon the county records, it is, in fact, a county tax levied for county purposes. The state does not deal with the individual taxpayer, but its revenue is apportioned to, and collected from, the various counties in their corporate capacity, in proportion to the taxable property in each, and is payable by the county, whether collected from the taxpayer or not; and therefore money raised from taxation for general county purposes is not diverted from the object for which it

was laid, within the meaning of article IX, section 3, of the constitution, by being applied in payment of the amount of state revenue apportioned to the particular county. As we understand the law, upon the showing made by this record, the County Treasurer of Multnomah County should have given notice that he had on hand a certain amount of money belonging to the road fund applicable to the payment of warrants on such fund theretofore indorsed, "Not paid for want of funds," but no warrants drawn on the general fund of the county can be paid by him until after the state tax is paid in full. The judgment of the court will therefore be modified accordingly.

MODIFIED.

[Decided at PENDLETON July 31, 1897.]

WYATT v. WYATT.

(49 Pac. 855.)

1. **EQUITY APPEAL WITHOUT THE EVIDENCE.**—The failure to bring up the evidence with the transcript on appeal renders it impossible to try the cause anew as provided by Hill's Ann. Laws, § 543, or to modify the findings of fact or correct the conclusions of law deducible therefrom, and leaves only for consideration the question whether the pleadings are sufficient: *Howe v. Patterson*, 5 Or. 353, followed.
2. **CONSTRUCTION OF PLEADING.**—In view of section 84, Hill's Ann. Laws, providing that the allegations of a pleading "shall be liberally construed, with a view of substantial justice between the parties," the inadvertent omission of the word "not" in a complaint will be cured by a decree for plaintiff: *Weiner v. Lee Sking*, 12 Or. 276, applied.
3. **CREDITOR'S BILL—SUFFICIENCY OF COMPLAINT.**—A creditor's bill that alleges the issuance of an execution and its return nulla bona is sufficient without an averment that the debtor has no property out of which the judgment can be satisfied: *Page v. Grant*, 9 Or. 116, followed.
4. **MARRIED WOMEN—LEVY OF EXECUTION AGAINST HUSBAND.**—In view of the liberal statutes in Oregon relating to married women, personal property transferred by a husband to his wife is not in his possession so that it can be seized under a writ against him.

31	531
37	552
31	531
39	464
31	531
148	614

From Union: ROBERT EAKIN, Judge.

Suit by M. F. Wyatt against C. G. and S. M. Wyatt to set aside certain transfers of property alleged to be fraudulent. Plaintiff prevailed and defendants appealed.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Thomas H. Crawford*.

For respondent there was a brief over the names of *Baker & Baker*, and *N. E. McLeod*, with an oral argument by *Messrs. McLeod* and *Joseph F. Baker*.

MR. CHIEF JUSTICE MOORE delivered the opinion.

This is a suit to set aside a conveyance, and to subject the real property therein described to the satisfaction of plaintiff's judgment. It is alleged in the complaint that at all times therein mentioned the defendants, C. G. Wyatt and Sadie M. Wyatt were and are husband and wife; that about November, 1890, C. G. Wyatt became indebted to the plaintiff in the sum of \$206.66 on account of money paid him at his request, and for his use and benefit; that he was then the owner of certain real property, particularly describing it, "and a large amount of personal property, the description of which is not known to the plaintiff"; that on September 28, 1895, plaintiff, having commenced an action in the Circuit Court of Union County against C. G. Wyatt to recover the amount so due, caused a summons to be issued therein and served on the said defendant, who, on October 2 of

that year, for the pretended consideration of \$1,500, and with intent to defraud plaintiff and his other creditors, conveyed said real property to the said defendant Sadie M. Wyatt, and also sold and transferred to her, for a pretended consideration, all his personal property not exempt from execution, and that she still holds and claims all said property; that on November 4, 1895, by consideration of the circuit court, plaintiff obtained a judgment in said action against Wyatt for the sum of \$206.66 and his costs and disbursements taxed at \$100, and the same was duly entered in the judgment lien docket of Union County; that an execution issued on this judgment was delivered to the sheriff of said county for service, who, on December 4, 1895, returned the same wholly unsatisfied, and recited thereon that after diligent search and inquiry he had been and was unable to find any property belonging to C. G. Wyatt upon which to levy; "that said C. G. Wyatt had, at the time above mentioned, nor has he now, any other property than the real and personal property before mentioned and described, and that he is insolvent"; that said conveyance was voluntary, and made and accepted by the parties thereto with the fraudulent intent of placing the property out of the reach of this plaintiff and the other creditors of C. G. Wyatt. A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of suit against either of the defendants having been overruled, an answer was filed which, after denying the material allegations of the complaint, alleged certain facts by way of affirmative defense. A reply having put in issue the

allegations of new matter contained in the answer, a trial was had before the court, which, after making findings of fact and law from the evidence taken, gave a decree for plaintiff, from which the defendants appeal, but the evidence so taken was not brought up with the transcript.

1. It is contended by counsel for the defendants that, in the absence of the evidence, the case is before us on appeal upon the pleadings, findings of fact, and conclusions of law. The statute provides that upon an appeal from a decree given in any court the suit shall be tried anew upon the transcript and evidence accompanying it: Hill's Ann. Laws, § 543. In *Howe v. Patterson*, 5 Or. 353, an appeal from a decree having been taken, and the transcript filed without the evidence, it was contended by counsel for the appellant that the findings of fact set forth in the decree were conclusive upon the parties to the appeal; but it was held that the proposition insisted upon was untenable, the court saying: "An appeal from a judgment in an action at law, as provided for in our code, is in the nature of a writ of error at common law, because it expressly provides that a judgment can only be reviewed as to questions of law appearing upon the transcript. Thus it will be seen that on appeals in actions at law issues of fact cannot be reviewed by this court. But, as it is provided that on an appeal from a decree in a suit in equity, 'the same shall be tried anew upon the transcript and evidence,' it is obvious that where testimony was taken in the court below, it must be brought here, so this court may try the cause anew, as well upon the facts as upon the law." It would be impos-

sible to modify the findings of fact without having before us the evidence upon which they are predicated, or to correct conclusions of law not properly deducible therefrom. Yet it is quite clear that the modification of such findings and conclusions must, of necessity, be involved where a trial anew is had upon the "transcript and evidence." It follows that the cause cannot be tried anew in the absence of the evidence.

2. This being so, the only question before us for consideration is, does the complaint state facts sufficient to support the decree? Upon this question it is insisted that the complaint is fatally defective, because it fails to allege that the defendant C. G. Wyatt, at the time the suit was instituted, had no property out of which the debt might have been collected. In some jurisdictions this averment has been held to be essential, notably so in Indiana, where in *Brumbaugh v. Richcreek*, 127 Ind. 240 (22 Am. St. Rep. 649), McBRIDE, J., in discussing the subject, says: "In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, an averment that at the time the suit was brought the debtor had no property out of which the debt might be collected, or an averment equivalent thereto, is material and necessary, and its omission is fatal." The reason upon which this rule is founded is that in a suit in the nature of a creditors' bill the right to uncover property alleged to have been fraudulently conveyed, and to subject it to the payment of the grantor's antecedent debts, rests upon the doctrine of necessity; but, if the debtor have other property, however, applicable to and out of which the creditor's demand may be satis-

fied, there is no necessity for a resort to this remedy, in which case a court of equity is powerless to set aside a voluntary conveyance; for so long as a person possesses reason, and owes no duty to another, he may make such disposition of his property as best pleases his fancy, and such court will not assume to act as his guardian; but when he is indebted to another his property, or sufficient thereof to satisfy his creditor's demands, is morally pledged as security therefor, in which case, if the debtor, with intent to hinder, delay, or defraud his creditors, transfer all his property to a party who accepts the title with knowledge of the grantor's intention, a court of equity, upon an allegation of the necessity therefor, will uncover the fraud, and set aside the conveyance; and, hence, in those jurisdictions where the rule prevails, the importance of alleging that at the time the suit was instituted the debtor had no property out of which his creditor's demands could be satisfied, or words of equivalent import. Examining the complaint in the light of this rule, it will be observed from the quoted paragraph that plaintiff inadvertently omitted the word "not" after the word "had," supplying which it would read as follows: "That said C. G. Wyatt had [not], at the times above mentioned, nor has now, any other property than the real and personal property before mentioned and described, and that he is insolvent." It is contended that this last clause, "that he is insolvent," is a legal conclusion not deducible from the facts averred. In the strict grammatical sense, this is no doubt true, but, reading the allegation in the light of the legal conclusion, it is manifest that the word "not"

has been omitted from the sentence. The decree can not supply any material fact omitted from the complaint, but it establishes every reasonable inference that is deducible therefrom: *Weiner v. Lee Shing*, 12 Or. 276 (7 Pac. 111). The statute provides that in the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties: Hill's Ann. Laws, § 84. Reading the quoted paragraph of the complaint as a whole, in the light of the statute, it would appear to be reasonably inferable therefrom that the defendant C. G. Wyatt, at the time the suit was instituted, had no property except such as he had conveyed to his wife, out of which the plaintiff's judgment could have been satisfied, and any error in this respect is evidently cured by the decree.

3. But, however this may be, in *Page v. Grant*, 9 Or. 116, the same contention was made, in answering which the court say: "We do not think this proposition can be sustained. Courts of equity entertain jurisdiction in such cases, for the reason that the remedy at law has failed or proved ineffectual. The sheriff's return of the execution unsatisfied is the best evidence of such failure of the remedy at law, and cannot be controverted: *Jones v. Green*, 68 U. S. (1 Wall.), 330; *McElwain v. Willis*, 9 Wend. 559. When a judgment creditor has issued an execution, and the sheriff has returned it unsatisfied, he has exhausted his legal remedy. See, also, Bump on Fraudulent Conveyances (2d ed.), 525. The plaintiff having alleged the issuance of a writ of execution, and its return nulla bona, if he had entirely omitted to aver that the defendant

C. G. Wyatt had no property out of which the judgment could have been satisfied, the facts stated were nevertheless sufficient to entitle him to the relief granted.

4. It is also insisted by counsel for the defendants that the complaint shows that at the time this suit was commenced there was a large amount of personal property in the possession of and claimed by Sadie M. Wyatt which had been transferred to her for a pretended consideration, after plaintiff had instituted his action at law against her husband; that the wife's possession of such property is that of her husband; and, since he had a large quantity of personal property, it was sufficient to satisfy plaintiff's judgment and costs, without resorting to a suit in equity to set aside the deed. The proposition contended for assumes that the allegation of a large amount of personal property is equivalent to an averment that it was of the value of \$307.16, the amount of the judgment and costs and disbursements. What might be considered by some as a large amount of property might not be so regarded by others; but, however this may be, it would be difficult indeed to say with any degree of certainty that the quantity of property alleged was of the value stated. Assuming, however, that it was of this price, it does not follow, under the very liberal married woman's act of this state, that the possession of the wife is that of her husband, so that this property could have been levied upon as that of the defendant C. G. Wyatt. The transfer of this property, as between the husband and wife, was valid (*Bradtfeldt v. Cooke*, 27 Or. 194, 50 Am. St. Rep. 701,

40 Pac. 1); and if Sadie M. Wyatt took possession of it under the transfer, and exercised acts of ownership over it, the presumption of fraud arising from the failure to obtain possession of property capable of immediate delivery is dispelled: Hill's Ann. Laws, § 776, subd. 40; *Rule v. Bolles*, 27 Or. 368 (41 Pac. 691). The court having granted the relief demanded, must necessarily have found that Sadie M. Wyatt was in possession of the personal property at the time this suit was instituted; and, the complaint having stated facts sufficient to constitute a cause of suit, it follows that the decree must be affirmed, and it is so ordered.

AFFIRMED.

[Decided November 15, 1897; rehearing denied.]

31 539
146 58

GOLDSMITH v. ELWERT.

(50 Pac. 867.)

1. ALLEGATIONS AND PROOF—FINDINGS.—A decree must always follow the issues made by the pleadings, and if it is based on irrelevant evidence or on extraneous issues it cannot be upheld: *Bender v. Bender*, 14 Or. 353; *Woodward v. Oregon Railway and Navigation Company*, 18 Or. 289, and *Knahila v. Oregon Railway and Navigation Company*, 21 Or. 186, approved and applied.
2. TRIAL DE NOVO IN SUPREME COURT.—On appeal to the supreme court in an equity suit, the original testimony will be reviewed, and the court will draw its own conclusions therefrom, rendering such final decree as may be proper.
3. PRESUMPTION—FAILURE TO APPEAL.—A party who does not appeal is considered as accepting the situation; if dissatisfied, an appeal must be taken, either direct or cross: *Shirley v. Burch*, 16 Or. 83; *Thornton v. Krimbel*, 28 Or. 27; *Cooper v. Thomason*, 30 Or. 162, followed.

From Multnomah: LOYAL B. STEARNS, Judge.

This is a suit by P. Goldsmith, S. Oppenheimer, and B. Goldsmith, as partners, under the firm name

of Goldsmith & Loewenberg, against Mrs. J. B. Elwert and Charles P. Elwert, to foreclose a lien on certain real property in the City of Portland. The facts are that on June 17, 1893, plaintiffs entered into a contract with Mrs. Elwert, by the terms of which they agreed to furnish one No. 23 Boynton hot-water heater, one galvanized iron tank, twenty-seven radiators, and the necessary piping, constructed in such a manner as to secure a free and continuous circulation of hot water, and to place the same in a house built by Mrs. Elwert on said premises, and guarantied that the radiators placed in the rooms should be capable of heating the same to 70° Fahrenheit when the temperature was at zero outside, and, in consideration thereof, Mrs. Elwert agreed to pay plaintiffs \$840, within thirty days after the completion of the work; that on October 16, 1893, plaintiffs executed a written memorandum which specified, as a further condition of their guaranty, that the fuel to be used in attaining the guarantied degree of heat should be wood; that plaintiffs entered upon the performance of their contract, which they claim to have executed in accordance with the terms thereof, and, to secure the payment of the amount agreed to be paid, filed in the proper office, within the time prescribed by law, their claim of lien, and bring this suit to foreclose the same, alleging that Mrs. Elwert, after the execution of said contract, had conveyed the premises to the defendant Charles P. Elwert. The defendants, after denying the material allegations of the complaint, which is in the usual form, allege that plaintiffs, well knowing that Mrs. Elwert was constructing a building

to be rented and used as a boarding house or family hotel, agreed to place the heater, pipes, and radiators therein, guarantying to raise the heat, in each of the rooms in which a radiator might be placed, to the degree hereinbefore stated, but that the apparatus so placed in said building would not raise the temperature in such rooms above 54° Fahrenheit, under the conditions specified in said contract; that plaintiffs had been requested to remove the heater, pipes, and radiators, but had neglected to do so; and that, in consequence of their failure to keep and perform their engagements, defendants had sustained a loss, and been damaged in the sum of \$1,450, for which they prayed a decree. The allegations of new matter contained in the answer having been denied in the reply, a trial was had; and from the evidence taken thereat the court made, inter alia, the following findings: "That, among other things, it was guarantied by the said plaintiffs that said house should heat 70° when the temperature is at zero outside; and the court finds that there is a great deal of conflict in the testimony as to whether said apparatus will heat 70° when the temperature is at zero outside, and finds that it will not do so. The court further finds that plaintiffs were at all times ready and willing to test said apparatus to ascertain said fact, and at all times offered to, and were willing to, increase the heating capacity of said apparatus, and to in every respect cause it to conform to said guaranty; and that the said defendants refused to permit said plaintiffs to do so, and refused to permit plaintiffs to make a full and sufficient test of said heating apparatus, and refused to permit them to in

any way increase the capacity thereof, and refused to permit them to fully and entirely complete their said contract with defendants. They suffered no damages by reason of the said apparatus being in said house, or by reason of any defect therein, and are not entitled to recover any damages herein. That \$640 is a reasonable sum to be allowed plaintiffs as payment for the said apparatus as it now sets in said house, for the work, labor, and services performed and material furnished to and upon said house in putting in said apparatus, and \$10 is a reasonable sum to be allowed plaintiffs for attorney's fee for foreclosing this lien." The court thereupon decreed that the said lien be foreclosed, and ordered the property sold to satisfy the amounts so found to be due, without awarding costs or disbursements to either party, from which decree defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Watson, Beekman & Watson*, with an oral argument by *Messrs. Edward B. Watson and Dell Stuart*.

For respondents there was a brief over the names of *Geo. G. Gammans*, and *McGinn, Sears & Simon*, with an oral argument by *Messrs. Henry E. McGinn and Nathan D. Simon*.

MR. CHIEF JUSTICE MOORE, after making the foregoing statement, delivered the opinion of the court.

1. It is contended by counsel for defendants that the only issue made by the pleadings is as to whether

the apparatus so furnished by plaintiffs complied with the terms of their guaranty, and that, the court having found that it did not, the suit should have been dismissed, and hence it was error to find that the defendants refused to permit plaintiffs to perform their engagements, or that the work and labor performed and materials furnished were of any reasonable value. The defendant's answer was in the nature of a plea of avoidance in law, which admitted the execution of the contract, but denied any liability thereunder by reason of plaintiff's default in failing to supply such apparatus as they had agreed to furnish: 4 Enc. Pl. & Prac. 666. The allegations of this plea having been denied, the chief question to be determined is whether the temperature could be raised, by the means so furnished, to 70° Fahrenheit when the temperature outside was at zero. The allegations of the respective parties afford the foundation, and the proof corresponding therewith constitutes the superstructure erected thereon, which, when considered together, will support the decree; and, under this rule, it has been held that a decree in a suit must correspond with the allegations of the pleadings, and that, when it is predicated upon findings made from evidence which is not relevant to the issue, the decree cannot be upheld: *Bender v. Bender*, 14 Or. 353 (12 Pac. 713); *Woodward v. Oregon Railway and Navigation Company*, 18 Or. 289 (22 Pac. 1076); *Knahtla v. Oregon Short Line Railway Company*, 21 Or. 136 (27 Pac. 91). No issue having been raised on the question of plaintiffs' offer or defendants' refusal to permit them to make a

proper test of the apparatus, there was error in the court's finding thereon.

2. It is true, the circuit court found that the required temperature could not be obtained by the means furnished; but, the cause being tried here *de novo* on the evidence submitted in the court below, this court will draw its own conclusions* therefrom.

Reviewing the evidence, the most important fact to be deduced from it is whether the apparatus possesses the requisite capacity to heat the rooms to the extent agreed upon. It is conceded that plaintiffs supplied the heater, tanks, pipes, and radiators according to contract, put them in their proper positions in the house, made the necessary connections, and turned the water into the apparatus, from which there was no leakage, thereby demonstrating, that the joints were water-tight. The plaintiffs called R. McKay as a witness, who testified that he and one B. Singer, a plumber and gas-fitter, who had adjusted the apparatus, tested its capacity by starting a fire in the heater at about eleven o'clock in the forenoon, which they maintained until about five o'clock that evening, at which time they left the building; but, returning the next day, they renewed the fire, and succeeded in raising the temperature, which was about 40° or 45° without, to 74° in the hall and 73° in the dining room; whereupon they sent for defendants' architect to examine the apparatus, with a view to obtaining his approval of the same, but, a carpenter having taken off the front door in the meantime, the temperature had fallen to 54° before he arrived. Several expert wit-

*See *Nesley v. Ladd*, 29 Or. 354.—REPORTER.

nesses testified that Haswell's Engineers' and Mechanics' Pocket Book (thirty-first revised and enlarged edition, published in 1875, by Harper & Brothers, Franklin Square, New York) is a standard work upon the several subjects therein treated, and thereupon page 533 thereof was offered in evidence, which reads as follows: "Warming Buildings and Apartments by Low Pressure Steam (one and one-half to two pounds) or Hot Water. One square foot of plate or pipe surface will heat from forty to one hundred cubic feet of inclosed space to 75° in a latitude where the temperature ranges from 10° or 10° below zero. The range from forty to one hundred is to meet the conditions of exposed or corner buildings, of buildings less exposed, as the intermediate ends of a block, and of rooms intermediate between the front and rear. As a general rule, one square foot will heat seventy-five cubic feet of air in outer or front rooms, and one hundred in inner rooms. Plaintiffs' expert witnesses testify that one square foot of radiating surface will heat, on an average, seventy cubic feet of inclosed space in the latitude of Portland, Oregon, where the temperature very rarely falls to zero. The opinion of these witnesses in respect to the capacity of the apparatus in question is, no doubt, influenced to some extent by the fact that defendants' house has no large windows, and being protected by a brick fire wall on one side, and sheltered by a building on another, is not very much exposed to cold weather. One of defendants' expert witnesses, however, says that there is very little difference between a corner and an inside house, for

the reason that no high winds were ever known to prevail in this climate. It is admitted that the boiler placed in defendants' building has a capacity for heating seven hundred square feet of radiating surface, and that, if one square foot of radiation equal seventy cubic feet of inclosed space, it will require not more than six hundred and fifteen and one-third square feet of radiation to heat the house to the required degree, and that plaintiffs placed in the several rooms twenty-seven radiators, aggregating six hundred and fifty-four and one third square feet of radiation. It will thus be seen that, if the ratio existing between the square feet of radiating surface and the cubic feet of inclosed space be correct, the boiler possessed ample capacity, and the radiators afforded a sufficient number of square feet of exposure, to heat the building properly. The important inquiry, therefore, is to ascertain the ratio in question, for upon its proper solution the decision must necessarily hinge.

The only evidence that tends to controvert the ratio assumed is the fact that the temperature in the building was never raised, probably, to the required standard by the means supplied, and the opinion of C. C. Clark, an expert witness, called by defendants, who testifies, in substance, that a No. 23 Boynton heater carries seven hundred feet of radiation, and that the radiation in the house is about six hundred and fifty square feet; that the boiler is large enough for the radiation, but the radiation is not sufficient for the house; that he had not personally examined the apparatus in question, but he was certain that, with less radiation than one square foot to forty feet

of inclosed space, the temperature could not be raised from zero outside the building to 70° Fahrenheit within. This witness, having had much experience in heating buildings, appears to be thoroughly conversant with the subject, and no one can read his testimony without being impressed with the belief that his opinion was the result of careful consideration on his part; yet we feel that the ratio so given by him is overborne by the weight of evidence. It is true that other witnesses called by defendants testify that, in their opinion, the apparatus in question will not heat the building to the required degree of temperature, under the conditions imposed; but they do not testify concerning this ratio, nor assign any reason for their opinion, except the general belief that the heater is too small for the purpose for which it was furnished. A. R. Church, a plumber and gas-fitter, being called as a witness for defendants, says that he sent a man to test the heater, who maintained a fire therein for four hours, and that, while the temperature was 76° outside the building, he could obtain but 72° within the rooms; that two large circulating coils in the hall did not get warm, but the rest of the coils got as hot as was necessary; and that he did not touch these two coils, nor intend to do so. E. J. Church, who assisted in making this test, being called as a witness, corroborates A. R. Church, and says that every radiator in the building got hot except the two coils in the hall, and that, if the hot water had circulated in them, it would have increased the temperature throughout the house. William Stokes, architect of defendants' building, says that the radiators have

an air valve, which, when unopened, causes an air chamber to be formed, which prevents circulation; that he discovered the water did not circulate, but did not inform the persons who were attempting to test the apparatus of this fact as it was not his place to tell them what was wrong, but it was their duty to know what to do. The deposition of plaintiff B. Goldsmith shows that when the test of the apparatus was made by McKay the house was unfinished and damp, without carpets, furniture, curtains, or shutters, and unoccupied; that carpets, curtains, and shutters tend to exclude the cold, and to retain the heated atmosphere; that when a room is furnished, a quantity of air, equivalent to the number of cubic feet contained in the furniture, is displaced, thereby rendering it unnecessary to heat the space so occupied; that it is customary, and was also contemplated when the contract was entered into with Mrs. Elwert, that the final test would be made, and the maximum degree of temperature obtained, when the house was finished, the walls dry, and the rooms furnished and occupied; and that the time necessary to make a proper test of the heating capacity of the apparatus is from seven to ten days.

It is very evident that the test of the heater made by the defendants' witnesses was very unfair; for knowing that, if the air was permitted to escape from the coils,—which could be easily liberated by opening the valves,—the heated water would circulate in the pipes and radiators, thereby increasing the temperature in the building, they purposely made no effort in that direction. While it does not positively appear

that the temperature in the house was ever raised, by the means provided for that purpose, to the required standard under the conditions agreed upon, and it is very doubtful if that fact can ever be demonstrated, for the reason that the temperature very rarely falls to zero in the latitude of Western Oregon, yet we think the preponderance of the evidence fairly shows that the heater, pipes, and radiators are capable of generating the stipulated degree of heat, under the circumstances recited in the contract; and, such being the case, plaintiffs were entitled to recover the contract price of the apparatus, and to a foreclosure of their lien.

3. The court having found that the reasonable value of the articles so supplied and the work and labor performed in placing them in position was but \$640, for which it gave a decree, and plaintiffs having failed to appeal therefrom, any error of the court in that respect must be deemed to have been waived by such failure (*Shirley v. Burch*, 16 Or. 83, 8 Am. St. Rep. 273, 18 Pac. 351; *Thornton v. Krimbel*, 28 Or. 271, 42 Pac. 995; *Cooper v. Thomason*, 30 Or. 162, 45 Pac. 295); and hence it follows that the decree is affirmed.

AFFIRMED.

[Decided November 22, 1897.]

CONSER v. COLEMAN.

(50 Pac. 914.)

RATIFICATION—AGENT.—Before a principal can be said to have ratified the unauthorized act of an agent, it must appear that the principal knew what the agent had done.

From Lane: J. C. FULLERTON, Judge.

Suit by Elizabeth Conser against E. P. Coleman, administrator of R. B. Cochran, deceased, America Cochran, Anna Murch, W. W. Cochran, C. R. Cochran, J. B. Cochran, E. B. Barger, Henry Kruse, and S. H. Holt. From a decree for plaintiff, defendant C. R. Cochran appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. Lawrence Bilyeu*.

For respondent there was a brief and an oral argument by *Mr. George B. Dorris*.

PER CURIAM. This is a suit to foreclose a mortgage executed by R. B. Cochran to the plaintiff. The defendant Charles R. Cochran, answering the complaint, which is in the usual form, alleges that the mortgage covered, with other property, a life interest of his father in a tract of land of which he was the owner in fee of an undivided one fourth; that after the execution of the mortgage it was agreed by and between the mortgagor and mortgagee and himself that if he, the said Charles, and his wife, would deed

their interest in a certain eighty-acre tract thereof to one J. E. Roach, and permit the purchase price to be applied on the mortgage, the mortgagor would deed to him, in lieu thereof, and the plaintiff would release from the lien of such mortgage, a certain other tract; that in pursuance of this agreement, and in reliance thereon, he and his wife signed and executed the deed to Roach, and the proceeds thereof were received by the plaintiff, and applied on the mortgage; and that he immediately thereafter went into possession of the tract of land agreed to be conveyed to him by the mortgagor, and has ever since occupied the same. The reply denying the allegations of the answer, evidence was taken, a trial had, resulting in a decree in favor of the plaintiff, and said defendant Charles R. Cochran appeals.

The question in the case is one of fact, and while it is clearly shown from the evidence that the appellant and his father, the mortgagor, entered into the agreement and contract set out in the answer, and that, relying thereon, the appellant and his wife executed the deed to Roach, it is equally as clear that such contract was made without the authority or consent of plaintiff. Indeed, it was not seriously claimed at the argument that she was a party to the agreement; but the contention is that, having received the proceeds of the land sold to Roach, and applied them on her mortgage, she thereby ratified the contract under which such proceeds were acquired. But it is elementary law that, before one can be held to have ratified the unauthorized acts or contracts of another, he must have knowledge thereof; and there is no pre-

tense that plaintiff knew at the time she received the money of any agreement between the defendant and his father concerning the release of her mortgage. Nor is there any room in the case for the doctrine of subrogation. The decree is affirmed.

AFFIRMED.

[Decided November 22, 1897; rehearing denied.]

HANDLEY v. JACKSON.

(50 Pac. 915.)

1. **EQUITY—ENJOINING EXECUTION.**—A court of equity has jurisdiction to restrain the enforcement of an unconscionable judgment procured through fraud, or unavoidable accident, or excusable mistake.
2. **GROUND OF EQUITABLE RELIEF.**—The party invoking such jurisdiction must not only show some adequate ground of interference with the judgment, but must also disclose a meritorious and sufficient defense to the law action, or at least to some substantial part thereof.
3. **UNAUTHORIZED APPEARANCE OF ATTORNEY—EVIDENCE.**—In a proceeding to restrain the enforcement of a judgment on the ground that the only appearance of an unserved defendant was by an unauthorized attorney, it is competent to hear evidence aliunde, offered for the especial purpose of rebutting the presumption of authority in the attorney.
4. **EQUITABLE RELIEF AGAINST JUDGMENT—APPEARANCE BY UNAUTHORIZED ATTORNEY.***—The enforcement of a judgment dependent upon the appearance of an unauthorized attorney for a party who was not served with summons may be restrained in equity, irrespective of whether the attorney is responsible financially, or acted by collusion with the other party.
5. **RATIFICATION.**—A judgment rendered against a defendant under an unauthorized appearance by attorney is not ratified by a conditional but unaccepted offer to pay a certain sum in full satisfaction of the judgment.
6. **RES JUDICATA—JUDGMENT.**—A judgment is conclusive only on parties and privies, and after a party has had a day in court, from which it

* NOTE.—The authorities as to the effect of a judgment obtained upon an unauthorized appearance by an attorney are reviewed in extensive notes to *Williams v. Johnson* (N. C.), 21 L. R. A. 848, and *Little Rock Railway Company v. Wells* (Ark.), 54 Am. St. Rep. 246.—REPORTER.

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follows that where several persons are sued but only part of them are brought in, a judgment between the plaintiff and such defendants cannot bind the defendants who did not participate therein.

From Yamhill: **HENRY H. HEWITT**, Judge.

Charles Handley seeks to restrain the sale of certain real property of his situate in Yamhill County, about to be sold under and by virtue of an execution issued out of the Circuit Court of the State of Oregon for Washington County upon a judgment therein given and rendered in an action at law in favor of the defendant Ellen L. Jackson and against plaintiff and one T. B. Handley. The action was upon a joint and several promissory note executed by the said Charles and T. B. Handley to W. R. Jackson, who indorsed the same to Ellen L. Jackson, the defendant herein and plaintiff in said action. The present bill alleges that Ellen L. Jackson held said promissory note in trust for W. R. Jackson by voluntary indorsement and transfer without consideration; that she began said action against this plaintiff and T. B. Handley, but that no summons was ever served upon this plaintiff, and that he never had any notice or knowledge whatever of the pendency thereof, or that the same had been instituted, until long after the rendition of judgment therein; that said T. B. Handley, who is an attorney of said court, appeared in said action as the attorney for plaintiff, but that such appearance was wholly unauthorized by plaintiff, and without his knowledge, direction, or consent. It is also alleged that the note had been fully paid and discharged prior to the commencement of said action. A journal

entry in the original action overruling a demurrer recites that the plaintiff appeared therein by attorney, and this is the only finding of the court touching his appearance in the action disclosed by the record. The decree being for plaintiff, defendants appeal.

AFFIRMED.

For appellants there was a brief and an oral argument by *Mr. Thos. H. Tongue*.

For respondent there was a brief over the names of *J. E. Magers* and *James McCain*, with an oral argument by *Mr. Magers*.

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing language, delivered the opinion of the court.

1. The principal contention of defendants is that, inasmuch as this suit was not instituted for the express purpose of annulling, correcting, or modifying such judgment, the attack thereon is collateral; and hence, being the judgment of a court of general jurisdiction, it was incompetent to impeach, by evidence dehors the record, the finding of said court that the defendant had appeared by attorney, which involves the presumption that the court also and necessarily found that the attorney had the requisite authority to enter such appearance. There was some controversy at the argument touching the nature of the suit in this regard, and it may be considered as collateral under the generally accepted definition of a collateral attack, but it is not necessary for us to determine the

question here. Let it suffice to say that there is a well-established and clearly-defined equitable jurisdiction which will enable courts of equity to restrain the enforcement of an unconscionable judgment or decree procured through fraud, or through some unavoidable accident, or excusable mistake of the defendant in the action or suit. Mr. Pomeroy, under title, "To Restrain Actions or Judgments at Law," states the doctrine as follows: "That where the legal judgment was obtained or entered through fraud, mistake, or accident, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake, or accident, and there had been no negligence, laches, or other fault on his part, or on the part of his agents, then a court of equity will interfere at his suit, and restrain proceedings on the judgment which cannot be conscientiously enforced": 3 Pomeroy's Equity Jurisprudence, § 1364. Chief Justice MARSHALL recognizes it in the following language: "It may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery": *Marine Insurance Company v. Hodgson*, 7 Cranch, 331, 336. And in further support thereof, see *Hendrickson v. Hinckley*, 58 U. S. (17 How.), 443; *Brown v. Buena Vista County*, 95 U. S. 157; *Crim v. Handley*, 94 U. S. 652; *Phillips v. Negley*, 117 U. S. 666

(6 Sup. Ct. 901); *Wagner v. Shank*, 59 Md. 313; *Given's Appeal*, 121 Pa. St. 260 (6 Am. St. Rep. 795, 15 Atl. 468); *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Bryant v. Williams*, 21 Iowa, 329. Mr. Freeman says: "The judgment complained of is permitted to stand, and the court of equity merely inquires whether there are any equitable circumstances requiring it to prevent the person in whose favor the judgment was recovered from enforcing or taking advantage of it." See elaborate and well-considered note to *Morrill v. Morrill*, 20 Or. 96 (23 Am. St. Rep. 95-117; 25 Pac. 362), and 2 Freeman on Judgments, § 485; also *Martin v Parsons* 49 Cal. 94. So that, with this understanding of the jurisdiction and its exercise, it can make no appreciable difference whether such a suit be regarded as a direct or collateral attack upon the judgment.

2. In general, the party invoking the jurisdiction must not only show some adequate ground of interference with the judgment, but must also disclose a meritorious and sufficient defense to the law action, or at least to some substantial part or portion thereof: *Piggott v. Addicks*, 3 G. Greene, 428 (56 Am. Dec. 547); *Dunklin v. Wilson*, 64 Ala. 162; *Taggart v. Wood*, 20 Iowa, 236; *Sauer v. City of Kansas*, 69 Mo. 46; *Reeves v. Cooper*, 12 N. J. Eq. 223; *Stokes v. Knarr*, 11 Wis. 389; *Colson v. Leitch*, 110 Ill. 504; *Tomkins v. Tomkins*, 11 N. J. Eq. 512; *Parsons v. Nutting*, 45 Iowa, 404; *Harnish v. Bramer*, 71 Cal. 155 (11 Pac. 888). Although some authorities maintain that, where judgment has been entered without service of process, and no jurisdiction having been acquired over the person, appropriate relief will be granted without inquiry

touching the merits of the original claim: *Bowen v. Allen*, 113 Ill. 54 (55 Am. Rep. 398); *Great West Mining Company v. Woodmas Mining Company*, 12 Colo. 46 (13 Am. St. Rep. 204, 20 Pac. 771). But, however this may be, the allegations of the complaint herein bring the plaintiff fairly within the requirements of the generally accepted rule above stated.

3. It is perfectly competent in such a proceeding to hear evidence aliunde, offered for the especial purpose of negating or overcoming the presumption of authority in the attorney to enter the appearance of an unserved defendant whom it is sought to conclude by the record: *Weeks on Attorneys at Law*, § 202; *Harshey v. Blackmarr*, 20 Iowa, 161 (89 Am. Dec. 520); *Bryant v. Williams*, 21 Iowa, 329; *Shelton v. Tiffin*, 47 U. S. (6 How.), 163.

4. The rule formerly obtained in England, and in some of the states of the Union, that an appearance by an attorney for a party without his sanction or authority was deemed sufficient for the court, which would look no further, but would proceed, and leave the party to his remedy against the attorney, unless he was irresponsible, or his appearance was through procurement or collusion with the adverse party: *Lattuch v. Pasherante*, 1 Salk. 86; *Denton v. Noyes*, 6 Johns. 296 (5 Am. Dec. 237); *Bunton v. Lyford*, 37 N. H. 512 (75 Am. Dec. 144). However, the rule in nearly, if not all, those jurisdictions has latterly been much qualified, and disabused of its ancient rigor. But by the current of the more modern authorities it has been discarded as void of sound reason for its support: Judge DILLON in *Harshey v. Blackmarr*, 20 Iowa,

161 (89 Am. Dec. 520), very ably demonstrates the injustice of the rule. He says: "It obliges a person to be bound by the unauthorized act of a mere stranger. It binds him by a judgment of a court without a day in court. It relieves the other party of a duty which, in reason, belongs to him, viz., to serve his process, and to see, at his peril, that his adversary is in court. And it carries out this unsoundness by compelling the wrong party to look to the attorney. True, reason and logic would say, if an attorney appeared for me without my knowledge or authority, express or implied, I should not be bound by the act if never ratified or promptly disavowed, and if the adverse party, being ignorant of the want of authority, and carelessly omitting to serve process, or to require the attorney to show his authority, has been damaged, he, and not myself, should be the one to look to the attorney." The inexorable logic of this great jurist has had its effect, so that there is now no longer any doubt but that the enforcement of a judgment obtained and resting upon the unauthorized appearance of an attorney for a party not served may be restrained in equity, irrespective of the question whether the attorney is responsible or irresponsible, or acted by procurement or collusion with his antagonist: *Parsons v. Nutting*, 45 Iowa, 404; *Newcomb v. Dewey*, 27 Iowa, 381. As to whether such a judgment is void, or voidable only, it is not within the scope of the case at bar for us to determine. It is sufficient for the present purposes that it is either.

5. The evidence is strong and clear that T. B. Handley appeared in the action for Charles Handley,

and, having so appeared, filed a separate answer in his behalf, without his knowledge or consent, and that no service of summons was ever had upon the latter. Indeed, Charles Handley had no knowledge whatever that the action had been commenced, or of the judgment having been obtained and entered against him, until notified some ten or twelve days thereafter by the attorney for Mrs. Jackson. True, Handley made a conditional offer to pay a stated sum in full satisfaction of the judgment and costs, when so notified; but this was not accepted, and an execution was at once issued. The offer, unaccepted, was not a ratification of the judgment rendered against him under the unauthorized appearance. The suit to enjoin was commenced before the condition of any of the parties had changed, and there was no laches or lack of diligence in the plaintiff herein in ascertaining his rights and asserting them when fully understood.

As it pertains to the remaining facts in the case, the court below found that Ellen L. Jackson was the holder of the note sued on in the Washington Circuit Court in trust for W. R. Jackson, and that the same had been fully paid, satisfied, and discharged prior to the commencement of the action thereon; and we believe, after a careful consideration of all the evidence, that these findings are supported by the proof. These considerations affirm the decree of the court below, and it is so ordered.

AFFIRMED.

ON REHEARING.

MR. JUSTICE WOLVERTON delivered the opinion.

6. Since filing the opinion in this case the defendants filed a motion for rehearing based upon a question alluded to in the argument of counsel, but not discussed in the briefs, and it is now insisted that it is vital, and ought to be settled. It is claimed that the judgment in the case of Jackson against T. B. and Charles Handley is *res adjudicata*, and binding upon Charles Handley, even though he did not appear in the action, because the payments which it is alleged discharged the obligation were made by T. B. Handley; that is to say, that Charles Handley, by claiming the benefit of such contractual relations between T. B. Handley and Jackson, thereby puts himself in privity of contract with T. B. Handley, and that the judgment, being conclusive upon T. B. Handley, operates with like effect against Charles. It will be remembered that the action against T. B. and Charles Handley was upon a joint and several promissory note, and was a case in which a several judgment could have been entered. If both had been served, T. B. might have, if he so desired, permitted judgment to have gone against him by default, and, if so, it could not have been claimed that the default judgment was *res adjudicata* as to Charles. Now, would the case have been different if T. B. had been first served, and trial had upon the very ground which Charles Handley now insists discharged the obligation, and Charles had subsequently been brought in, and sought to resist

payment by an interposition of the same defense? We think it can hardly be so claimed. In *Eikenberry v. Edwards*, 71 Iowa, 82 (32 N. W. 183, 56 Am. Rep. 360), a case of some analogy, several parties were sued, and, having severed at the trial, one of them prevailed. Subsequently, in a trial against another, it was sought to conclude the plaintiff by the former judgment. But the court, speaking through ROTHROCK, J., said: "It would be a novelty in the law of former adjudication if a defendant in an action can procure a separate trial as to the issues between him and the plaintiff, and then claim that the trial between the plaintiff and another defendant was an adjudication as to him." As bearing somewhat on the question, see, also, *Smith v. Ballantyne*, 10 Paige, 101; *Coleman v. Hunt*, 77 Wis. 263 (45 N. W. 1085). It is a fundamental principle that a judgment can only conclude parties and their privies. In so far as it respects the judgment in the case of Jackson against the Handleys, it stands as though Charles had never been made a party or appeared in the action. And the pretended judgment actually entered against T. B. Handley, under the circumstances of the case, could have no more binding force and effect upon Charles than if one had been entered without making him a party in the first instance, as each was entitled to his day in court, and to contest Jackson's right of recovery. No privity of contract can exist between codefendants thus situated. Motion denied.

REHEARING DENIED.

[Decided November 29, 1897; rehearing denied.]

WILLIS v. ABRAHAM.

(51 Pac. 79.)

1. **HARMLESS ERROR—ARGUMENTATIVE PLEADING.**—The refusal to strike out of an answer certain allegations that constituted an argumentative denial was harmless, where the allegations were such as could have been proven under the specific denials.
2. **ADMISSIBILITY OF EVIDENCE.**—Evidence that a deed of land was given to plaintiff as a matter of convenience and in trust for defendant, although not pleaded, is admissible to rebut evidence by plaintiff that defendant and he purchased the land together.
3. **IDEM.**—A defendant having denied that he ever entered into a transaction wherein he agreed to pay plaintiff a part of the proceeds of certain lots, may, without pleading payment or release, introduce in evidence a receipt made by plaintiff to him, purporting to be "in full of all accounts to date, including all demands, of whatsoever nature," in order to show the improbability that such a transaction existed prior to the date thereof.

From Douglas: J. C. FULLERTON, Judge.

Action by William R. Willis to recover from Sol. Abraham certain moneys alleged to be due under a contract. Judgment for defendant, and plaintiff appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William R. Willis* in pro. per.

For respondent there was a brief and an oral argument by *Messrs. C. A. Sehlbrede* and *Albert Abraham*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

The cause of action, as exhibited by the complaint, is, in substance, as follows: That in January, 1882, the

plaintiff was the owner of an undivided half of thirty-one acres of land at Green's Station, and that defendant was the owner of an undivided one half of fifty-seven acres at what is now the town of Dillard, and thirty-four acres at what is now the town of Riddle, all in Douglas County, Oregon; that it was then mutually agreed that all said lands should be laid off into town lots and offered for sale; that plaintiff should attend to and do all necessary legal business in recording plats of said town lots, and all other matters necessary to be done, so that the sale thereof should be in all respects legal, and, when his interest in the lands at Green's Station was sold, that he should pay to defendant one third the proceeds of the same, in consideration whereof defendant undertook to pay to plaintiff one third the proceeds of the sale of the lands or lots at Dillard and Riddle, when sold; that plaintiff has duly performed on his part, but that defendant, although having sold his interest in the lands and town lots at Dillard and Riddle, refuses to pay to plaintiff one third of the proceeds thereof, amounting to \$912.83. The answer denies that plaintiff was the owner of any interest in the lands at Green's Station, or had any title thereto, except the mere legal title, which was conveyed to him in trust for the defendant, under an express understanding that he should convey said lands to defendant when the conditions of a contract concerning the same between the said defendant and one Jephtha Green, the former owner thereof, should be fully performed. It is admitted that the defendant was the owner of the undivided half of the lands and lots at Dillard and Riddle, but

all other allegations of the complaint are specifically denied, except as it concerns the transfer of the land at Green's Station, which is qualified by an allegation that the plaintiff, upon a rescission of the contract with Jephtha Green, at defendant's request redeeded the land to said Green, but without consideration, except that plaintiff recovered from Green compensation for some pretended services while holding the legal title. A motion was filed and overruled to strike out the affirmative matter contained in the answer. The verdict and judgment being for defendant, plaintiff appeals. Error is predicated of the disallowance of the motion, and the assignments involve, also, alleged errors in the admission of evidence and instructions to the jury.

1. The affirmative matter of the answer, to which objection is taken by the motion to strike out, constitutes an argumentative denial of the allegations in the complaint which it was intended to explain. Such a pleading may be considered faulty, in the light of the best authorities, but the court's refusal to strike out could have done the defendant no harm, inasmuch as those facts could have been proven under the specific denials. The evidence would have been the same in either event, and consequently the result the same. Under these circumstances, the ruling on the motion was not reversible error: *Davis v. Shuler*, 14 Fla. 438.

2. The plaintiff, as a witness in his own behalf, testified, among other things, as follows: "Mr. Abraham and I got these town lots together, and on or about the eighth day of January, 1882, we agreed to

give Mr. Brandt one third of the proceeds of these lots. The agreement was that we were to sell these lands and divide the proceeds. * * * It was made here in Roseburg, in Mr. Abraham's office in his store. That was after we had title to this interest in those town sites along the line of the road." J. B. Riddle, J. M. Dillard, Jeptha Green, the defendant, and other witnesses called in behalf of the defendant, testified, over the objection of the plaintiff, to matters tending to show that all these lands were purchased by the defendant, the consideration moving from him only, and that plaintiff had or acquired no interest therein whatever, except that the deed from Jeptha Green for the land at Green's Station was given to him as a matter of convenience, and in trust for the defendant. The tract was afterwards redeeded to Green. The plaintiff contends that this testimony was incompetent, because it tended to prove an issue not made by the pleadings; it being admitted that defendant was the owner of a half interest in the Dillard and Riddle tracts. But the plaintiff himself opened up the controversy when he testified that he and the defendant got the town lots together, which would imply that they were jointly interested in the purchase thereof, and it was perfectly relevant and competent for the defendant to rebut this showing.

3. While plaintiff was still a witness in his own behalf, and under cross-examination, the defendant produced a receipt executed by plaintiff to him on November 26, 1888, purporting to be "in full of all accounts to date, including all demands of whatever nature," which was offered in evidence over plaintiff's

objection, based upon the ground that no payment or release was pleaded in the answer. The purpose of the offer was to show the improbability of the existence of such an arrangement or transaction as plaintiff alleges to have existed between him and the defendant prior to that date, and not to show payment or settlement of that particular demand, for it was denied in toto. In this view, its admission was not error. An instruction touching the receipt was also objected to upon the same ground. When read, however, in connection with the other instructions, it is in accord with the purpose for which the receipt was offered, and therefore unobjectionable. Other instructions excepted to were properly given, and, there being no error in the record, the judgment of the court below will be affirmed.

AFFIRMED.

[Decided November 29, 1897; rehearing denied.]

WHALEN v. TIPTON.

(50 Pac. 1015.)

FRAUDULENT REPRESENTATION—MISTAKE—RESCISSION.—In order to constitute fraud such as will justify a rescission of a contract, the act or omission by which the alleged undue advantage is claimed to have been obtained must have been willful and intentional.

From Lane: J. C. FULLERTON, Judge.

For appellants there was a brief over the name of *Bilyeu & Young*, with an oral argument by *Mr. L. Bilyeu*

For respondents there was a brief and an oral argument by *Mr. J. R. Cunningham*.

PER CURIAM. This is a suit by W. H. and Jennie M. Whalen against Mahala and John E. Tipton to cancel a deed executed by the plaintiffs on December 29, 1894, conveying to the defendants forty acres of land in Lane County, in exchange for lots one and two, in block five, of West Tabor Villa, in the City of Portland, on the ground that the plaintiffs were induced to make such exchange by the false and fraudulent representations of the defendant J. E. Tipton as to the amount then due upon a mortgage on the Portland property. In our opinion, this allegation is not supported by the testimony. The most that can be claimed from the evidence is that, pending the negotiations, the defendant J. E. Tipton stated to the plaintiffs that there was in the neighborhood of \$400 due on the mortgage, according to a pass book which he had showing the payments he made thereon, and that at the time the trade was consummated he said they owed but \$334 thereon, when in truth and in fact there was about \$683 due. But this is not enough to constitute fraud. It is a necessary ingredient of fraud, even in equity, that the act or omission by which the undue advantage is obtained should be willful and intentional. A mere mistake is not sufficient: 2 Pomeroy's Equity Jurisprudence, § 873. Now, there is no evidence whatever to show that defendant's statement as to the amount due on the mortgage was willfully or designedly made, or that it was not made in the utmost good faith, and with an honest belief that it was true. The trade was sought by the plaintiffs, and he informed them, at the time, of the nature of the mortgage on the property, and the names of the

mortgagee and its agent in Portland, so that they could have ascertained the exact amount due thereon if they had so desired. He concealed nothing from them in this regard. After examining the property, and satisfying themselves in relation thereto, the plaintiffs signified their willingness to make the exchange, and on their invitation the defendants went from Portland to Lane County, for the purpose of examining their property, and after some further negotiations they finally agreed to make the exchange. At the request of the plaintiffs, the defendants wrote to Portland for the pass book, which shows the amount and date of all payments made on the mortgage, and also for a certificate from the agent of the mortgagee to the same effect. After the receipt of this book and certificate, and after an estimate of the amount due on the mortgage had been made at plaintiffs' request by a disinterested party, the exchange was consummated. There is no pretense but what all the payments which had been made on the mortgage were correctly shown on the book, and the plaintiffs were just as competent to estimate the amount due as the defendants. It was from this book the defendant J. E. Tipton obtained the information upon which he based his opinion, and it was from the results of calculations made therefrom that all parties supposed that only \$334 remained due on the mortgage. The mortgage in question was one given to the Guarantee Saving and Loan Association, September 15, 1890, by the then owner of the property, to further secure the payment of an advancement of \$1,100 made to him by the company on eleven shares of its stock, and by its

terms provided for a monthly payment of \$8.25 on the stock, besides interest at the rate of 6 per cent. per annum, and a premium of 7 per cent. per annum on the principal sum named in the mortgage. The system under which it was given, and upon which these payments were to be made, was such that no one but an expert could estimate with any reasonable degree of accuracy the amount due on the mortgage, and the error into which the parties in this case seem to have fallen was but natural, yet it was not the result of any fraud or deceit on the part of the defendants. The decree of the court below must therefore be reversed, and the complaint dismissed.

REVERSED.

[Argued November 17; decided December 7, 1897.]

WICKTORWITZ v. FARMERS' INSURANCE
COMPANY.

(51 Pac. 75.)

1. **PAYMENT OF INSURANCE PREMIUM—EVIDENCE.**—Under a provision in a policy of insurance that, unless the premium be paid at the company's home office at the time the policy was issued (such payment to be evidenced only by the president's receipt accompanying the policy), or within thirty days by check or draft direct to the company, payable to the president, the policy should be null and void, a receipt in full of premium charged, and the testimony of the company's agent that he delivered the policy, collected the premium, and remitted the same to the company, less his commission, is sufficient to prove the payment of said premium.
2. **PROOF OF AGENCY.***—The rule that the statements of an agent are not competent to prove his own agency applies only to such statements when made out of court, and does not restrict the right of a person to testify concerning the nature and extent of his agency for another.
3. **ADMISSIONS OF AGENT—WHEN BINDING.**—To have an agent's admissions bind his principal they must have been made in connection with

* NOTE.—In this connection see *Connell v. McLoughlin*, 28 Or. 220.—REPORTER.

31	569
39	508
31	509
36	104
31	569
38	246
31	569
45	387
31	569
45	257
31	569
46	595

some act as agent; thus, a statement by a general manager of a corporation, made in the course of a private conversation, and not in connection with or as part of any official duty is not competent evidence of the matter stated, against the principal: *North Pacific Lumber Company v. Willamette Mill Company*, 29 Or. 219, applied.

From Linn: GEORGE H. BURNETT, Judge.

This is an action by Selig Wicktorwitz and Company against The Farmers' and Merchants' Insurance Company of Albany, Oregon, on an insurance policy covering loss or damage by fire to the amount of \$1,000 on certain personal property belonging to the plaintiffs, while situated at No. 48 Blecker Street, New York. The complaint is in the usual form alleging the issuance of the policy, the destruction of the property by fire on December 31, 1889, its value, notice to the defendant of the loss and damage, and the submission of due proofs thereof within the time required by the policy. The answer denies all the allegations of the complaint, except the incorporation of the defendant, and, for a further and separate defense, in substance alleges that on May 4, 1889, in consideration of the sum of \$15 to be paid as therein provided, the defendant company agreed to, and did, issue to the plaintiffs' assignor the policy of insurance mentioned and referred to in the complaint; that one of the conditions thereof is that "if, at the time of the making of this policy, the money consideration herein named be not actually paid in lawful money to the company at its office in Albany, Oregon, which payment shall be evidenced only by a receipted bill of the company over the signature of the president, accompanying said policy, payment thereof shall then

be made within thirty days from the date of the issue of policy by bank check or draft direct to company, payable to order of the president,—otherwise this policy shall be void”; that the premium was not paid at the time of issuing the policy, or at all; and that, by reason thereof, the policy is void, and of no force or effect whatever. It is also alleged that, by the terms of the policy it is provided that “when a fire has occurred, injuring the property herein described, the assured shall use all practicable means to save and protect the same, and shall give immediate notice of the loss in writing to this company, at its office in Albany, Oregon. When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory of the whole thereof, including property claimed to be totally destroyed, to be made and furnished this company, naming the quantity, quality, and cost of each article”; that the plaintiffs utterly and entirely failed and neglected to give immediate notice of the alleged loss, in writing, to the company, at its office in Albany, Oregon, and have failed, refused, and neglected to give to the defendant any notice whatever, in writing or otherwise, of the alleged loss by fire; either at its office in Albany, Oregon, or elsewhere, and have utterly failed and refused to make or cause to be made any inventory of such personal property alleged to have been destroyed by fire, including that alleged to have been totally destroyed, naming the quantity, quality, and cost of such articles, or to furnish the

same at any time to the defendant. The reply denies the allegations of the answer, and alleges that the premium was paid to the defendant through its general agent in the City of New York, and that it received and applied the same to its own use, less the agent's commission, and thereby waived the right to have it paid at its home office by bank check or draft payable to the order of its president; and that the plaintiffs duly gave notice of their loss to the defendant, and also furnished due proof thereof, as alleged in the plaintiff's complaint herein; and that defendant received the same, and never made any objection thereto, and never demanded of plaintiffs any other or further proof of loss, or an inventory concerning said property, at any time; and that defendant thereby waived its right to, and should be estopped from, setting up such defense at the trial of this cause. Upon the issues joined, a verdict and judgment was rendered in favor of plaintiffs. From this judgment the defendant appeals, alleging error in the admission of testimony, and in overruling its motion for a nonsuit.

REVERSED.

For appellant there was a brief over the name of *Weatherford & Wyatt*, with an oral argument by *Mr. James K. Weatherford*.

For respondent there was a brief and an oral argument by *Mr. O. H. Irvine*.

MR. JUSTICE BEAN, after making the foregoing statement, delivered the opinion of the court.

1. The contention for the defendant is—*first*, that there was no sufficient proof of payment of the premium, in accordance with the terms of the policy; and, *second*, that there was no legal evidence that notice of the fire or proof of loss had been given to the defendant company, as required by the terms of the policy. Upon the first question it is enough to say that the evidence shows the application for the insurance to have been made to one J. M. Lewis, who was an agent or representative of the company in New York, and by him forwarded to the home office, where it was approved, and the policy issued, and forwarded to Lewis, for delivery to the assured. Lewis subsequently delivered the policy, collected and remitted the premium, less his commissions, to the company, and its receipt thereof was introduced in evidence, and this is sufficient proof of its payment.

2. Upon the other question the evidence is that, after the fire, Lewis was notified thereof, and proceeded to effect an adjustment of the loss, proof of which was furnished to him within the time required by the policy. The objections to the admission of the testimony, as well as the motion for a nonsuit on this branch of the case, are all based upon the hypothesis that there was no competent evidence to show that Lewis was in fact an agent of the company, with authority to settle and adjust losses, and receive notice and proof thereof, at the time of the fire. The only testimony bearing on the question of his agency and authority in this regard, aside from his assuming to act for the company, is that of himself and Judge Hewitt. Lewis, whose evidence was taken by depo-

sition in New York, testified that for some time prior to October 22, 1889, he had been in the habit of procuring policies of insurance from the defendant company by correspondence, and that the policy in suit was so procured, but that, on the day named, he entered into a written agreement to represent the defendant as its agent in issuing policies, collecting premiums, adjusting losses, and otherwise representing it, east of the Rocky Mountains, and that he acted under this authority in adjusting the loss and receiving and forwarding notice and proof thereof. Being asked to produce and deliver his commission to the officer taking his deposition, so that it could be made a part thereof, he refused to part with the original, but delivered a copy, which was attached to and made a part of his deposition. Upon the objection of the defendant, however, the court refused to permit this copy to be read in evidence, on the ground that it was incompetent. Judge Hewitt testified that he was one of the attorneys who commenced this action; that after its commencement, in the course of a general conversation with Mr. Elderkin, the secretary and general manager of the defendant company, in the City of Albany, Elderkin said that Lewis was the agent of the defendant in the City of New York, and that a certain paper which the witness then exhibited to him was a copy of his commission. This paper was offered and received in evidence, over the objection of the defendant that it was incompetent, and not the best evidence, and that no proper foundation had been laid for the introduction of secondary evidence of the contents of the original commission.

The objection urged to the testimony of Lewis is based upon the well established rule that the mere declarations of an agent are not competent testimony to prove the fact of agency. But this rule does not prevent him from testifying in court upon the subject. It has reference only to proof of the declarations of an alleged agent made out of court, and not to such as he may make under oath as a witness. The testimony of an agent as to the nature and extent of his authority, when it rests in parol, is as competent as the testimony of any other witness who may have knowledge on the subject. "It is competent to prove a parol agency, and its nature and scope," says Mr. Justice VALENTINE in *Howe Machine Company v. Clark*, 15 Kan. 494, "by the testimony of the person who claims to be the agent. It is competent to prove a parol authority of any person to act for another, and generally to prove any parol authority of any kind, by the testimony of the person who claims to possess such authority. But it is not competent to prove the supposed authority of an agent, for the purpose of binding his principal, by proving what the supposed agent has said at some previous time. Nor is it competent to prove a supposed authority of any kind, as against the person from whom such authority is claimed to have been received, by proving the previous statements of the person who it is claimed had attained such authority." It is clear, therefore, that Lewis was a competent witness; but, as it appears and is admitted that his authority at the time of the fire was conferred by a written instrument, the writing is, of course, the best evidence of the nature and extent of his agency, and, in accordance

with the familiar rules of evidence, must be produced, or, if not, its absence must be satisfactorily accounted for, before parol evidence of its contents is admissible; and hence his oral testimony as to the nature and extent of his authority was incompetent. It might be suggested, however, in this connection, that his refusal to permit his original commission to be made a part of his deposition is a sufficient showing of diligence on the part of the plaintiffs for the admission of secondary evidence of its contents. But that question is not before us, because the court below ruled out the copy annexed to the deposition, and it is not a part of the record here.

3. The paper introduced in evidence as a copy of his commission was not shown to be such except by the admissions of Elderkin, the general manager of the company, made to Judge Hewitt, and such admissions were incompetent as evidence to bind the defendant. The rule is well settled that the admissions of an agent to bind his principal must be made at the time and as a part of some act in the execution of his authority: 1 Greenleaf on Evidence, § 113; *Cunningham v. Cochran*, 52 Am. Dec. 230, and note. There is no evidence that Elderkin was doing any act within the scope of his authority at the time he made the alleged admissions. They were made in the course of a general conversation with Judge Hewitt about the agencies of the company, and we know of no rule of law that will justify the admission in evidence of the declarations or admissions of the general manager of a corporation to charge the company simply because he is such. If, in the performance of some act within

the scope of his authority, he makes an admission which is part of the *res gestæ*, such admission is admissible in evidence against his principal, because it is a part of the act; and it is only when the acts of an agent will bind his principal that his representations, declarations, and admissions respecting the subject matter become competent evidence for that purpose: *North Pacific Lumber Company v. Willamette Mill Company*, 29 Or. 219 (44 Pac. 286). Eliminating from this case the oral testimony of Lewis as to the nature and extent of his agency, and what purports to be a copy of his commission, introduced in evidence, all which, as we have said, is incompetent, there remains no evidence whatever showing or tending to show that Lewis had authority to adjudicate losses or accept notice and proof thereof; and for this reason the judgment of the court below must be reversed, and the cause remanded for a new trial.

REVERSED.

WOLVERTON, J., being interested in the result, took no part in this decision.

[Decided October 28, 1895.]

KLOSTERMAN v. MARQUAM.

APPEAL from Multnomah County.

Suit by A. G. Klosterman against P. A. Marquam and others to foreclose a mortgage. Decree for plaintiff, from which this appeal is taken.

Mitchell, Tanner & Mitchell, for appellants.

21 Or.—111.

Bronaugh, McArthur, Fenton & Bronaugh, for respondent.

The parties having agreed upon a settlement of the disputed matter, and stipulated accordingly, on motion the appeal was dismissed. No opinion.

DISMISSED.

[Decided October 6, 1906.]

WATTS v. WILTROUT.

APPEAL from Washington County.

Suit by M. M. Watts against John Wiltrout and others to set aside a conveyance and subject certain lands to the payment of a judgment held by plaintiff. Plaintiff and part of the defendants appeal.

Mr. Thomas H. Tongue, for appellants.

Messrs. Samuel B. Huston and Barrett & Adams, for respondents.

Respondent Clara Dixon moves to dismiss the appeal on several grounds.

The appeal was dismissed with costs to respondent Dixon. No opinion.

DISMISSED.

[Decided November 9, 1896.]

MARX v. MOY HAM.

APPEAL from Multnomah County.

Action by Dan Marx against Moy Ham and Richard Roe, in which plaintiff had judgment.

Mr. Frank V. Drake, for appellants.

Messrs. Emmons, Smith & Emmons, and *George J. Cameron*, for respondent.

It appearing that the appeal had been abandoned, the judgment of the lower court was affirmed on motion. No opinion.

AFFIRMED.

[Decided December 29, 1897.]

OREGON LAND COMPANY v. STUBBINGS.

31b	579
31	561
31	583

APPEAL from Marion County.

Suit by the Oregon Land Company against Wilson H. Stubbings and others to foreclose a mortgage. Stubbings and Marion County appeal.

Messrs. Robert G. Morrow and *Edward B. Watson*, for Stubbings.

Mr. George G. Bingham, for Marion County.

Messrs. Bonham & Holmes, for Oregon Land Company.

Pursuant to the written stipulation of the parties a final decree was entered adjusting the conflicting rights of the parties as they had agreed to among themselves. No opinion.

MODIFIED.

[Decided April 8, 1897.]

**AMERICAN FIRE INSURANCE COMPANY
v. FISHER.**

APPEAL from Multnomah County.

Action by the American Fire Insurance Company against Adam Fisher to recover the amount of a promissory note. There was a judgment for plaintiff and defendant appealed.

No appearance for appellant.

Messrs. Edward Mendenhall and John H. Hall, for respondent.

It appearing that the appeal herein had been abandoned, it was, on motion, ordered that the judgment of the lower court stand affirmed. No opinion.

AFFIRMED.

[Decided November 30, 1896.]

SHULTS v. HAMON.

APPEAL from Linn County.

Action by William Shults against C. C. Hamon, wherein plaintiff was defeated and appeals.

Mr. W. R. Bilyeu, for appellant.

Messrs. Blackburn & Somers, for respondent.

It appearing that the matters in dispute had been amicably settled out of court, the motion for dismissal was allowed. No opinion.

DISMISSED.

[Decided December 29, 1897.]

OREGON LAND COMPANY v. CRAGIN.

APPEAL from Marion County.

Messrs. Robert G. Morrow and Edward B. Watson, for Stubbings.

Mr. George G. Bingham, for Marion County.

Messrs. Bonham & Holmes, for Oregon Land Company.

This matter having been adjusted out of court, a decree was entered similar in all respects to the one in *Oregon Land Company v. Stubbings*, ante, p. 579. No opinion.

MODIFIED.

[Decided August 11, 1896.]

MUNROE v. MUNROE.

APPEAL from Washington County.

Suit by Jackson Munroe against Edith Munroe and others to enforce some alleged claims against certain real estate. There was a decree for plaintiff and defendants appeal.

Mr. Thomas H. Tongue, for appellants.

Messrs. Samuel B. Huston and Zera Snow, for respondent.

The parties having settled their differences and stipulated for a dismissal, it was so ordered. No opinion.

DISMISSED.

[Decided December 29, 1897.]

OREGON LAND COMPANY v. COFFEE.

Suit by the Oregon Land Company against H. T. Coffee, W. H. Stubbings, and others, to foreclose a mortgage. Stubbings and Marion County appeal from a decree for plaintiff.

Messrs. Robert G. Morrow and Edward B. Watson, for Stubbings.

Mr. George G. Bingham, for Marion County.

Messrs. Bonham & Holmes, for Oregon Land Company.

The matters in dispute having been settled herein by amicable agreement, a decree was entered in accordance with such settlement, and in all respects like the one in *Oregon Land Company v. Stubbings*, ante, p. 579.

MODIFIED.

[Decided November 8, 1897.]

SHORNO v. KIEFER.

Suit by L. C. Shorno against M. B. Kiefer and others to enjoin the collection of a certain judgment. Decree for defendants, from which plaintiff appeals.

Messrs. Cake & Cake, for appellant.

Mr. Benjamin P. Welch, for respondents.

It appearing that the parties had agreed that the appeal should be dismissed, it was so ordered.

DISMISSED.

[Decided October 7, 1897.]

FARWELL v. NEEDHAM.

(41 Pac. 936.)

From Linn: GEORGE H. BURNETT, Judge.

Messrs. George G. Bingham and *Thomas H. Tongue*, for appellant.

No appearance for respondent.

Opinion by MR. JUSTICE WOLVERTON.

This is a mandamus proceeding instituted for the purpose of requiring the defendant, who is the County Clerk of Linn County, Oregon, as such officer to file a complaint in a cause entitled in the Circuit Court of the State of Oregon for Linn County, wherein H. Farwell, the plaintiff herein, was plaintiff, and against one John N. Hoffman. The plaintiff tendered with the complaint the fee allowed the clerk under the act of October 26, 1882, but the defendant refused to make the filing desired until plaintiff should pay the fee fixed by the act of February 22, 1893, and by said act required to be paid before any filing could take place. The alternative writ was issued; to this a demurrer was interposed and sustained by the court below, and the writ dismissed. Plaintiff appeals. The same questions involved here were considered in *Northern Counties Trust v. Sears*, 30 Or. 388, and there passed upon adversely to the contention of plaintiff. That case is, therefore, decisive of this. The judgment of the court below will therefore be affirmed.

AFFIRMED.

[Decided April 27, 1896; rehearing denied.]

DOBBINS v. DOBBINS.

(44 Pac. 692.)

From Columbia: **THOMAS A. McBRIDE, Judge.**

Mr. W. B. Dillard, for respondent.

Mr. N. D. Simon, for appellant.

PER CURIAM. The only question for determination on this appeal is whether the evidence is sufficient to sustain the decree of the court below granting plaintiff a divorce. We have carefully examined the record, and, while we should not hesitate to affirm a decree refusing a divorce thereon, we are not prepared to say that the evidence fails to support the findings of the learned judge who heard it in the court below, and whose opportunity for passing upon the credibility of the witnesses and the weight of the evidence was much superior to ours, and, therefore, the decree of the court below is affirmed.

AFFIRMED.

[Decided October 6, 1896.]

STATE v. STURGEON.

From Tillamook: HENRY H. HEWITT, Judge.

R. Sturgeon was convicted of selling spirituous liquor in less quantities than one gallon, without having a license therefor, and appeals.

Mr. Thomas B. Handley, for appellant.

Mr. James McCain, for the state.

Appeal was dismissed for failure of appellant to file a brief within the enlarged time allowed for that purpose. No opinion.

DISMISSED.

[Decided October 6, 1896.]

KLEPPIN v. POHLE.

APPEAL from Marion County.

Action by Paul Kleppin against H. Pohle to recover the alleged value of certain personal services. Plaintiff appeals from an order dismissing his writ of review to the circuit court.

Messrs. George W. Hollister and W. H. Holmes, for appellant.

Messrs. Sherman, Condit & Park, for respondent.

Judgment of the lower court was affirmed for failure of appellant to file his brief as required by the rule. No opinion.

AFFIRMED.

[Argued March 12; decided December 7, 1896.]

FOREST GROVE DOOR CO. v. MCPHERSON.

(46 Pac. 884.)

From Washington: THOMAS A. McBRIDE, Judge.

This is a suit to foreclose a mechanic's lien. The facts are that the Forest Grove Door and Lumbering Company, a corporation, having furnished to the defendant Donald McPherson lumber and building material to be used in the construction of certain buildings, situate upon a tract of land in Washington County, filed on November 24, 1893, a claim of lien

thereon in the office of the county clerk of said county, containing a statement of its demand, to secure the payment of \$369.64, and on the next day commenced this suit to foreclose the same. Issue having been joined, a trial was had at which the court, having found that there was due the plaintiff \$341.50, gave a decree foreclosing the lien for that amount, from which the defendants appeal.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Thomas H. Tongue*.

For respondent there was a brief and an oral argument by *Mr. S. B. Huston*.

PER CURIAM. The building on which the lien is claimed was finished and occupied more than forty days before October 24, so that the case turns on the question when the last material listed in plaintiff's account was furnished by the mill company, the lien having been filed November 24. It is contended by counsel for the defendants that the claim was not filed within the time prescribed by law, in consequence whereof no lien ever attached to the property sought to be charged therewith. The decision of this question depends upon whether the material was furnished on the twenty-fourth day of October, 1893, or the day after. The defendants claim that they received it on the former date, while the plaintiff insists that it was not delivered until the next day. Albert W. Mills testifies that in October of that year he

worked for the plaintiff at its Buxton mill and delivered the lumber to the defendants, and, referring to the date, says: "My recollection is it was on the 25th; the reason for that, we were working at the dam, and I was in charge of the yard that day." This witness also says that McPherson made out a bill of the lumber so obtained on a piece of board, which was delivered to John L. Banks, the manager of the mill. The latter testifies that the lumber was obtained about October 25, although he was not present when it was delivered; and, again referring to the date, he says: "That was, I think, on the twenty-fifth day of October." The office of the plaintiff is located at Forest Grove, where its books are kept; and its journal, being offered in evidence, shows that on October 29 the plaintiff furnished the defendants merchandise valued at \$1.70. On the next line below this entry appears the following: "Oct. 25. To mdse. \$2.12." This relates to the lumber in question, but the entry, having been made after the 29th of that month, shows that the report of the sale had not reached the office on that date, and hence not much importance can be attached to the date of the sale of the lumber as evidenced by the entry in the journal. McPherson testifies that the lumber was obtained October 24, and that he remembers the date because on the next day he paid a bill of \$10, and took a receipt therefor which is dated October 25. The receipt, however, is not in evidence. Charles Smith testifies that he hauled the lumber in question from the mill on October 24. In fixing the date of the delivery of the lumber, neither of the witnesses for

plaintiff is positive that it was on the twenty-fifth of October, while McPherson and Smith each say that it was on the day before. We therefore find that the material was delivered on October 24, 1893, and the claim, not having been filed until the 24th of the next month, was not filed within the time prescribed by law, and as a consequence the lien had expired at the time of filing the claim. The decree will therefore be reversed and the complaint dismissed.

REVERSED.

[Decided December 21, 1896.]

McCANN v. WETHERILL.

(47 Pac. 100.)

From Josephine: HIERO K. HANNA, Judge.

For appellant there was a brief and an oral argument by *Messrs. Francis Fitch and Willard Crawford*.

For respondent there was a brief and an oral argument by *Mr. Davis Brower*.

PER CURIAM. This is a suit brought by Edward McCann to enjoin Alexander Wetherill from obstructing or interfering with the flow of water in and through a certain ditch by which a portion of the waters of Democrat Gulch, in Jackson County, is carried on to the lands of plaintiff, and used by him for irrigating purposes. The plaintiff claims title and the right to use three hundred inches of the water flowing in the gulch by adverse user of himself and grantors

for more than fifteen years. The answer denies the facts alleged, and sets up as a defense that Democrat Gulch is not and never has been a natural water course, but that all the water flowing therein was diverted from Althouse Creek into said gulch, and appropriated for the purposes of irrigation and for stock and domestic use by defendant's grantors and predecessors in interest more than twenty-five years ago, and has been continuously used by them for such purposes ever since and that any use of said water by the plaintiff and his grantors was a permissive one only. The reply put in issue the allegations of the answer, and upon the issues thus joined a trial was had resulting in a decree in favor of the defendant, from which the plaintiff appeals. The issues involved in the case are wholly questions of fact, and it is sufficient for us to say that after a painstaking examination of the evidence we fully concur in the conclusions of the trial court, and the decree is, therefore, affirmed.

AFFIRMED.

[Argued January 7; decided February 23, 1897.]

SOUTHERN OREGON COMPANY v. GAGE.

(47 Pac. 1101.)

From Coos: J. C. FULLERTON, Judge.

This is a proceeding by writ of review brought by the Southern Oregon Company against Gage, sheriff of Coos County, and others. The petition was filed in the court below September 10, 1895, and, omitting formal matters, states in substance that on the eight-

eenth day of July, 1895, a warrant was issued out of the County Court of Coos County to the sheriff, commanding him to collect certain delinquent taxes for the year 1894, among which was a pretended tax against the plaintiff of \$5,415.60, and that by virtue thereof the sheriff was about to seize upon certain personal property of the plaintiff in order to make the amount of such tax; that the warrant is based upon an order of the county court made July 12, 1895, directing its issuance; that the assessor failed to file the assessment roll until September 1, 1894, being after the time prescribed by law, and the extension thereof granted by the county court; that an unfinished roll was filed prior to the last Monday in August, 1894, but the assessor continued the work of assessment, and did not in fact complete it until the meeting of the board of equalization on August 27, 1894; that the county court failed to levy the tax at the September term, 1894, and did not make such levy until January 19, 1895, after the time fixed by law for so doing had expired; and that in the estimate of expenditures the court had unwarrantably included an item of \$7,000, being interest upon excessive and illegal indebtedness of the county. After setting out the effect of the evidence before the board of equalization touching the comparative value of certain pieces of property the petition assigns as error (1) that the order of July 12, 1895, is insufficient, in that it does not show that any taxes were levied upon plaintiff's property for the year 1894, or that any such taxes remained unpaid or delinquent; (2) that it appears from the record that no taxes had been legally levied against the property of plaintiff; (3) that the

attempted levy is based upon an unwarranted estimate of taxes; (4) that it was made without jurisdiction; (5) that the court failed to find in its said order what if any taxes assessed against plaintiff were delinquent and unpaid; (6) that plaintiff had no opportunity to be heard before the order was made; (7) that the county court, sitting as a board of equalization, placed a valuation upon the land of plaintiff in excess of that warranted by the evidence.

The return, in brief, shows that certain orders and proceedings were made and had as follows: On August 27, 1894, the board of equalization having under consideration the plaintiff's petition for a reduction of its assessment, continued the hearing thereon from day to day during the week, when the board adjourned and certified its proceedings to the county court, which met September 5, and continued the hearing from time to time until the 21st, when it ordered a large reduction of plaintiff's assessment. On the 22d the court continued the matter of levying the tax for 1894 until the regular January term thereof, and on January 24, 1895, the same being an adjourned day of said term, made its estimate of expenditures for the year, including therein \$7,000.00 interest upon county indebtedness, and levied a tax of 19 mills on the dollar. A warrant issued March 2, 1895. On April 3 the court extended the time for the return of delinquent taxes to July 6, 1895. On July 11 the sheriff filed the same with his certificate annexed, and on July 18 the warrant referred to in the petition was issued by the clerk. Although alleged in the petition, the return does not show that any order whatever was

made directing the issuance of this warrant. A motion to quash the writ having been sustained, judgment was given dismissing the proceedings, from which this appeal is prosecuted.

AFFIRMED.

For appellant there was a brief over the names of *J. W. Hamilton, Dolph, Mallory & Simon*, and *John A. Gray*, with an oral argument by *Messrs. J. W. Hamilton and Rufus Mallory*.

For respondent there was a brief over the names of *S. H. Hazard* and *George M. Brown*, district attorney, with an oral argument by *Mr. Hazard*.

Opinion by MR. JUSTICE WOLVERTON.

This record presents questions identical with those discussed and determined in a case just decided between the same parties involving the assessment and levy of taxes on plaintiff's property for the year 1893 (30 Or. 250, 47 Pac. 852), and it was so treated by counsel at the argument. That case is, therefore, decisive of this, and it is unnecessary to reiterate the reasoning here upon which the conclusions are based. The judgment of the court below will be affirmed.

AFFIRMED.

[Argued January 7; decided February 23, 1897.]

COOS BAY NAVIGATION CO. v. COOS COUNTY.

(47 Pac. 1101.)

From Coos: J. C. FULLERTON, Judge.

Petition by the Coos Bay, Roseburg and Eastern Railroad and Navigation Company against Coos County and its officers for a writ of review. From a judgment against it the petitioner appeals.

AFFIRMED.

For appellant there was a brief over the names of *John A. Gray, Dolph, Mallory & Simon*, and *J. W. Hamilton*, with an oral argument by *Mr. Hamilton*.

For respondent there was a brief over the names of *S. H. Hazard* and *George M. Brown*, district attorney, with an oral argument by *Mr. Hazard*.

MR. JUSTICE WOLVERTON.

The facts in this case are similar, being in many respects identical with those stated in the two cases of the *Southern Oregon Company v. Coos County*, 30 Or. 250, involving the validity of a tax levy upon the property of the plaintiff therein for the years 1893 and 1894, except that in this case the order of July 12, 1895, is exhibited by the return to the writ. The questions presented, both by the record and at the argument, are the same as in the two cases above referred to, which are therefore decisive of this.

AFFIRMED.

[Decided March 22, 1897.]

PLATTER v. UMPHLETT.

From Josephine: H. K. HANNA, Judge.

A. H. H. Platter and others sought to enjoin Alonzo Umphlett and others from using or diverting the waters flowing in certain channels on the land of plaintiffs. There was a decree for plaintiffs, from which defendants appeal.

Messrs. Francis Fitch and Willard Crawford, for appellants.

Messrs. Davis Brower and Webster & Hammond, for respondents.

Decree was affirmed on motion, the appellants being in default in not serving a brief. No opinion.

AFFIRMED.

[Decided April 5, 1897.]

BELL v. TOWN OF PRINEVILLE.

From Crook: W. L. BRADSHAW, Judge.

Action by M. H. Bell to recover from the Town of Prineville the amount of the costs and disbursements in a certain suit on the ground that defendant had promised to pay them if the plaintiff would dismiss such suit, which he had done. Plaintiff appeals from an order sustaining a demurrer to the complaint.

Mr. George W. Barnes and Wells Bell, for appellant.

Mr. J. T. Moore, for respondent.

On motion of respondent the judgment of the lower court was affirmed for failure of the appellant to file the abstract of the record required by the rules of the court. No opinion.

AFFIRMED.

[Decided April 5, 1897.]

CONNOR v. LAMBERT.

APPEAL from Crook County.

Suit by Connor Brothers against N. J. Lambert to enjoin the use of certain waters. There was a decree for plaintiffs, from which defendant appeals.

Mr. George W. Barnes, for appellant.

Mr. J. F. Moore, for respondent.

This is a companion case to *Connor v. Clark*, 30 Or. 382, and the appeal was dismissed on the authority of the prior decision. No opinion.

DISMISSED.

[Decided April 27, 1897.]

PEER v. KIERNAN.

From Multnomah: HENRY E. MCGINN, Judge.

Action by E. M. Peer against Kiernan, Kern & Church to recover damages for an injury sustained while working for defendants. Appeal from an order sustaining a demurrer to the second amended complaint.

Messrs. McDougall, Spencer & Jones, for appellant.

Messrs. Dolph, Mallory & Simon, for respondent.

The appeal was dismissed, the parties having so agreed. No opinion.

DISMISSED.

[Decided July 31, 1897.]

KOSHLAND v. NATIONAL FIRE COMPANY.

31b	597
31	599

From Umatilla: ROBERT EAKIN, Judge.

Mr. George E. Chamberlain, for appellant.

Mr. John J. Balleray and *Charles H. Carter*, for respondent.

MR. JUSTICE BEAN.

The plaintiff, Koshland, a citizen of the State of California, brought this action in the Circuit Court of

Umatilla County to recover the sum of \$4,110 on a fire insurance policy issued by the National Fire Insurance Company of Hartford. Within the proper time the defendant filed a petition and bond for removal of the cause to the Circuit Court of the United States for the District of Oregon, on the ground that it is a resident of the State of Connecticut. The court below refused to surrender its jurisdiction, and proceeded with the trial, which resulted in a judgment in favor of plaintiff. The defendant appeals, assigning as error, among other things, the refusal of the court to allow the petition for removal. The questions involved on this point are the same as in the other case between the same parties, just decided, and the opinion in that case will control in this. The judgment is, therefore, reversed, and the cause remanded with directions to the trial court to proceed no further in the matter unless its jurisdiction shall hereafter in some manner be restored.

REVERSED.

[Decided July 31, 1897.]

CHRISTIE v. PALATINE INSURANCE COMPANY.

From Umatilla: ROBERT EAKIN, Judge.

Mr. George E. Chamberlain, for appellant.

Messrs. John J. Balleray and Charles H. Carter, for respondents.

MR. JUSTICE BEAN.

This is an action brought in the Circuit Court of Umatilla County by Christie & Wise to recover \$16,800 on a policy of fire insurance issued by the defendant company. The plaintiffs are citizens and residents of the State of California, and the defendant is an alien corporation, organized and existing under the laws of Great Britain. The same question of removal to the federal court is involved in this case as in the two cases of *Koshland v. National Insurance Company*, just decided, and it is therefore governed by the decision in those cases. Judgment is reversed, and the cause remanded with directions to proceed no further in the matter unless the jurisdiction of the state court shall hereafter be restored.

REVERSED.

[Decided November 15, 1897.]

WALDMAN v. CONNELL.

From Multnomah: EWARTWELL HURLEY, Judge.

Messrs. J. C. Moreland and B. Killen, for appellant.

Mr. M. L. Pipes, for respondents.

PER CURIAM. The plaintiffs brought a suit to cancel and rescind a contract for the purchase by them from the defendant of an undivided three eighths interest in eighty acres of land near the City of Portland, and to recover the money paid thereon, on the

ground, *inter alia*, that since making the contract the defendant has sold and disposed of a large portion of the property agreed to be conveyed, and thereby rendered himself unable to comply with his agreement. The answer admits the inability of the defendant to comply with the original contract, but as a defense to this suit avers that after making such contract the plaintiffs and defendant mutually agreed to and did segregate their interest in the eighty-acre tract, the plaintiffs taking a certain thirty acres thereof, and that such agreement was consummated by a surrender by plaintiffs of the former contract and the acceptance of a new one in lieu thereof for the thirty-acre tract. The plaintiffs deny this defense in toto, and claim that no such agreement or contract was ever entered into by them, and that no such surrender of the first contract and the acceptance in lieu thereof of a contract for thirty acres ever took place. The evidence upon this question is conflicting and in many respects irreconcilable. The court below found in favor of the plaintiffs, and after a careful reading of the record and the briefs we do not feel authorized to say that it was in error in so doing, and for this reason the decree is affirmed.

AFFIRMED.

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AGENTS AND AGENCY.

IMPLIED POWER OF MUNICIPAL AGENT.

1. Delegation of authority to an agent implies the power to do all things necessary, proper, usual, and reasonable in order to effectuate the purpose of the agency, and this rule is applicable to the agents and officers of municipal corporations as well to the agents of private individuals.—*Flagg v. Marion County*, 18.

WHEN COUNTY COURT IS AGENT OF COUNTY.

2. A county court acting on the expediency and manner of repairing bridges in the public highway is acting as an agent of the county and not as a court.—*Stout v. Yamhill County*, 814.

AUTHORITY OF CORPORATE AGENT TO MORTGAGE.

3. A manager of a corporation who has been by the directors placed in charge of affairs, with full power to manage and conduct the business, is an agent with authority to mortgage the commercial property of the corporation as security for running expenses.—*Thayer v. Nehalem Mill Company*, 87.

RATIFICATION.

4. Before a principal can be said to have ratified the unauthorized act of an agent, it must appear that the principal knew what the agent had done.—*Conser v. Coleman*, 550.

AGENTS AND AGENCY—CONCLUDED.

ADMISSION OF AGENT—WHEN BINDING.

5. To have an agent's admissions bind his principal they must have been made in connection with some act as agent; thus, a statement by a general manager of a corporation, made in a private conversation, and not in connection with or as part of any official duty, is not competent evidence of the matter stated, against the principal.—*Wicktorvitz v. Farmers' Insurance Company*, 569.

PROOF OF AGENCY.

6. The rule that the statements of an agent are not competent to prove his own agency applies only to such statements when made out of court, and does not restrict the right of a person to testify concerning the nature and extent of his agency for another.—*Wicktorvitz v. Farmers' Insurance Company*, 569.

ALLEGATA ET PROBATA.

Decree Must Follow Issues in Pleadings. See JUDGMENTS.

AMENDMENT

Of Pleadings on Appeal from Justice's Court. See PLEADING, 2.

Of Complaint Before Trial by Adding New Cause of Action. See PLEADING, 6.

Of Complaint Before Trial by Dropping a Defendant. See PLEADING, 7, 8, 9.

Of Complaint After Motion for Nonsuit is Discretionary. See PLEADING, 10.

ANIMALS.

Trespass by Cattle, Horses, or Sheep on Unfenced Lands in Umatilla, Wasco, and Gilliam Counties. See TRESPASS.

ANSWER

Need Not Anticipate Defense. See PLEADING, 1.

ANTICIPATING DEFENSE.

Not Appropriate Under the Code System. See PLEADING, 1.

APPEAL.

AMENDING PLEADINGS ON APPEAL FROM JUSTICE'S COURTS.

1. The amendment of 1893 (Laws 1893, p. 38), repealing chapter 9, §80 of the Justice's Code, and substituting other provisions therefor, does not limit the right of amendment to cases in which the pleadings were oral, nor to such amendments as will not change the issues, but a defendant may, by leave of court, on appeal, file an amended answer, raising a defense which he omitted to plead in the court below, when substantial justice will be thereby promoted.—*Meyer v. Edwards*, 22.

GARNISHEE MAY APPEAL.

2. A garnishee against whom a personal judgment has been given in a justice's court may appeal therefrom.—*Burns v. Payne*, 100.

TRIFLING ERROR.

3. A cause will not be reversed for trifling mistakes in computation—such as \$2.25.—*Steel v. Farrell*, 169.

OBJECTIONS NOT MADE BELOW.

4. Irregularities in the verification and filing of objections to the final account of an assignee in insolvency cannot be urged for the first time on appeal.—*Es Murray's Estate*, 178.

HARMLESS ERROR.

5. Error in admitting evidence that plaintiff was damaged in a large sum is manifestly harmless where the recovery is for only a small amount.—*Strickland v. Gelde*, 873.

6. The refusal to strike out of an answer certain allegations that constituted an argumentative denial was harmless, where the allegations were such as could have been proven under the specific denials.—*Willis v. Abraham*, 562.

7. The erroneous admission of evidence offered in support of an allegation in the complaint which is not denied in the answer is not prejudicial to the defendant.—*Koshland v. Hartford Insurance Company*, 402.

APPEAL—CONCLUDED.

PAPERS IMPROPERLY IN TRANSCRIPT.

8. Papers that are not part of the judgment roll as defined by statute are not part of the transcript and will not be considered on appeal.—*Farrell v. Oregon Gold Company*, 464.

PAPERS NOT PART OF THE JUDGMENT ROLL—BILL OF EXCEPTIONS.

9. Papers filed in a law action other than those designated by Hill's Ann. Laws, § 272, subd. 2, as constituting the judgment roll, as for example, affidavits filed in support of a motion, cannot be considered by the appellate court unless they are properly incorporated in a bill of exceptions.—*Farrell v. Oregon Gold Company*, 464.

NECESSITY OF BILL OF EXCEPTIONS.

10. Whenever it is desired to review a finding of fact by a trial court based on evidence a bill of exceptions embodying the evidence is necessary to present the question to the appellate court, whether the exception to the ruling is taken orally or the ruling is deemed by law to have been excepted to.—*Farrell v. Oregon Gold Company*, 464.

EQUITY APPEAL WITHOUT THE EVIDENCE.

11. The failure to bring up the evidence with the transcript on appeal renders it impossible to try the case anew as provided by Hill's Ann. Laws, § 543, or to modify the findings of fact or to correct the conclusions of law deducible therefrom, and leaves only for consideration the question whether the pleadings are sufficient.—*Wyatt v. Wyatt*, 531.

DEMURRER OVERRULED BY CONSENT.

12. A demurrer interposed in the court below and subsequently overruled by consent cannot be again urged on appeal, if the complaint is sufficient to support a verdict.—*Sabin v. Anderson*, 487.

TRIAL DE NOVO IN SUPREME COURT.

13. On appeal to the supreme court in an equity suit, the original testimony will be reviewed, and the court will draw its own conclusions therefrom, rendering such final decree as may be proper.—*Goldsmith v. Elwert*, 539.

PRESUMPTION FROM FAILURE TO APPEAL.

14. A party who does not appeal is considered as accepting the situation; if dissatisfied, an appeal must be taken, either direct or cross.—*Goldsmith v. Elwert*, 539.

APPROPRIATION.

Reasonable Diligence Necessary to Hold Water Appropriation. See **WATERS**, 1.
Nonuser for one Season not an Abandonment of Water Right. See **WATERS**, 4.
Legislative Appropriation of Funds Defined. See **WORDS AND PHRASES**.
Continuing Appropriation for Salaries of State Officers. See **OFFICERS**, 3.
Not Included in Section 2220, Hill's Ann. Laws. See **STATUTES**, 6.

APPURTENANCE.

Water Right Passes by Grant of Land. See **WATERS**, 3.

ASSESSMENT

Of Property—Not Conclusive on Owner. See **TAXATION**, 6.
Roll—How Corrected by County Court. See **TAXATION**, 4.
Roll—How Changed by Equalization Board. See **TAXATION**, 5.

ASSIGNMENT

Of Preferred Labor Claim after Presentation. See **CHOSES IN ACTION**, 2.
Of Choses in Action—Rights of Assignee. See **CHOSES IN ACTION**, 1.

ASSIGNMENTS FOR CREDITORS.

ASSIGNEE'S FINAL REPORT—PRACTICE.

1. An assignee for creditors, having discharged the duties of his trust, is entitled, upon filing his final account, to have it settled and adjusted, and all objections thereto passed upon and determined separately. Hence an order disallowing the account in toto is error.—*Re Murray's Estate*, 173.

ASSIGNMENTS FOR CREDITORS—CONCLUDED.

APPEAL—OBJECTIONS TO REPORTS NOT MADE BELOW.

2. Irregularities in the verification and filing of objections to the final account of an assignee in insolvency cannot be urged for the first time on appeal.—*Es Murray's Estate*, 178.

CHattel MORTGAGE NOT AN ASSIGNMENT.

3. A debtor who gave his wife a chattel mortgage on a stock of goods, before giving the mortgage, and two days thereafter, told other creditors that if his property was attached he would have to assign. After the mortgage was given, he and such creditors made a contract, whereby he was to pay seventy-five per cent. in full of his indebtedness—twenty-five per cent. in cash in one week and the balance in secured notes. Six days thereafter he notified them that it was impossible to do so, and on the following day the creditors attached the goods. Just before the attachment he told the creditors that if they would give him time he could pull through. The assignment was made the next day. *Held*, that the mortgage was not a part of the assignment, rendering the latter void on account of preferring the wife.—*Sabin v. Watkins*, 460.

ATTACHMENT AND GARNISHMENT.

GARNISHEE IS A "PARTY" TO AN ACTION IN A JUSTICE'S COURT.

1. A garnishee may appeal from a judgment rendered against him in a justice's court, under Hill's Ann. Laws, § 2117, providing that "either party may appeal from a judgment given in a justice's court," and §§ 152, and 163-170, providing that a plaintiff may obtain a personal judgment against a garnishee.—*Burns v. Payne*, 100.

NOTICE TO MUNICIPALITY NOT A GARNISHMENT.

2. A municipal ordinance requiring the auditor to withhold the issuance of warrants in payment for street or sewer improvements for five days after the acceptance of the work, and if a claim for labor or material is filed in the meantime to withhold the amount thereof for twenty days from the sum due the contractor, and if an action upon the claim is commenced, and a writ of attachment issued, and a notice thereof served upon the auditor within such time to withhold the same until the final determination of the rights of the respective parties, is not invalid as in contravention of the policy of the state exempting municipalities from attachment and garnishment.—*Hamilton v. Gambell*, 828.

NOT EQUIVALENT OF CREDITOR'S SUIT.

3. Garnishment and attachment laws do not afford an adequate and complete remedy to uncover assets fraudulently conveyed and to compel an accounting.—*Sabin v. Anderson*, 487; *Mallock v. Babb*, 516.

SUFFICIENT BASIS FOR CREDITOR'S SUIT.

4. Garnishment of a person to whom a fraudulent conveyance has been made gives a sufficient lien on the property to support a creditor's bill, and return of execution nulla bona is not necessary.—*Mallock v. Babb*, 516.

ATTORNEYS AND CLIENT.

POWER OF EXECUTOR TO CONTRACT FOR ATTORNEY'S FEES.

1. One who is acting in a representative capacity cannot bind the estate over which he has control except for expenses of protecting it or by statutory authority. Within this rule an administrator may, under section 1178, Hill's Ann. Laws, allowing reasonable attorney fees for necessary litigation, contract with an attorney to undertake litigation for a liberal fee contingent on success.—*Re McCullough's Estate*, 86.

ATTORNEYS FEES AGAINST ESTATE.

2. An attorney may be allowed his expenses necessarily incurred in travel for the estate which he represents, and a gross sum for all his services. This method of fixing compensation is preferable to allowing claims for different services as they are performed. It is desirable, too, that as few attorneys should be employed as is consistent with the amount and condition of the estate—ordinarily one is sufficient.—*Re McCullough's Estate*, 87.

3. An item in an administrator's final account of money paid to his attorney for making an inventory may be rejected when such attorney is allowed a gross sum for his services in the management and settlement of the estate.—*Re McCullough's Estate*, 86.

ATTORNEYS AND CLIENT—CONCLUDED.

COMPROMISE PENDING SUIT.

4. Settlement out of court after an action is brought, if made without the knowledge or consent of the attorney for the plaintiff, is to be viewed with suspicion, especially if the defendant knew of a contract giving the attorney supervisory control over the distribution of the collection.—*Falconio v. Larsen*, 187.

CONFIDENTIAL COMMUNICATIONS.

5. In an action against an attorney for money which plaintiff alleges defendant has converted to his own use, and defendant alleges he paid to others at plaintiff's direction, defendant cannot be excused from testifying to whom he made the payments on the ground of confidential communications, though the payment be considered a communication, and defendant was attorney not only for plaintiff, but for the parties to whom the payments were made.—*Minaud v. Stillman*, 164.

AUTHORITY OF ATTORNEY TO ACCEPT PAYMENT.

6. An attorney at law, under the general power to represent his client, cannot accept anything other than money in satisfaction of a judgment, except by special authority; thus, an attorney cannot direct a sheriff holding an execution to accept as payment thereon a certificate of indebtedness by a garnishee, for his power and agency do not extend that far.—*Barr v. Bader*, 225.

EFFECT OF UNAUTHORIZED APPEARANCE.

7. The rule that formerly obtained in England and in some of the states of the Union making the appearance of an attorney for a party without his sanction or authority conclusive upon him for the purposes of the action, and leaving him to his remedy against the attorney, unless the latter was irresponsible or his appearance was through procurement or collusion with the adverse party, does not obtain in Oregon.—*Handley v. Jackson*, 552.

AUDITING CLAIMS.

Secretary of State Must Audit Claims Presented Against the State—*Mandamus*. See OFFICERS.

Auditing Includes Drawing a Warrant. See OFFICERS.

BALLOTS.

Clerk May Procure Ballots Under the Australian Act. See COUNTIES, 3.

BILLS OF EXCEPTIONS.

Death of Judge Without Signing—Vacating Judgment. See JUDGMENTS, 2.

Necessary to Present Papers not in Judgment Roll. See APPEAL, 9.

Necessary to Present Findings of Fact for Review. See APPEAL, 10.

BILLS AND NOTES.

One who signs a promissory note "as trustee of" another is prima facie personally liable.—*Ogden Railway Company v. Wright*, 150.

BOARD OF EQUALIZATION.

Under the provisions of sections 2778 and 2779, Hill's Ann. Laws, a county board of equalization cannot declare property to be exempt from taxation after the assessor has listed it as taxable.—*Portland University v. Multnomah County*, 498.

BONDS OF PUBLIC OFFICERS. Same as OFFICIAL BONDS.

BONA FIDE PURCHASER.

Parent and Child—Lack of Consideration. See VENDOR.

BURDEN OF PROOF

In Opening Settled Accounts Rests on Plaintiff. See EVIDENCE, 3.

In Showing Fraud Rests on Plaintiff. See EVIDENCE, 5.

CASES FROM THE OREGON REPORTS Applied, Approved, Cited, Distinguished, Followed, and Overruled in this Volume. See OREGON CASES.

CATTLE.

Trespass by Cattle in Gilliam County. See TRESPASS.

CHARTERS OF CITIES. See MUNICIPAL CORPORATIONS.

CHATTEL MORTGAGES.

FRAUD—CONDUCT OF PARTIES.

1. A mortgage given originally as a security for a genuine debt may be rendered invalid by the subsequent action of the parties. Such will be the result whenever their mutual conduct enables the mortgagor to hinder and delay creditors in reaching property that is lawfully subject to their demands.—*Sabin v. Wilkins*, 450.

FRAUDULENT CONVEYANCE—BURDEN OF PROOF.

2. A creditor assailing an apparently valid chattel mortgage of his debtor on the ground that by extrinsic agreement or subsequent contract unlimited power of disposition for his own use and benefit was conferred upon the mortgagor must establish his contention in that respect, the presumptions are against him; and the fact that the mortgage lessens the chances of the other creditors for realizing their claims in full does not of itself render the transaction fraudulent.—*Sabin v. Wilkins*, 450.

RETENTION OF POSSESSION BY MORTGAGOR.

3. In Oregon a chattel mortgage is void as against attaching creditors whenever it appears either upon the face thereof or by extrinsic evidence that the mortgagor has been authorized to dispose of the property in the usual course of trade for his own benefit, though the mortgage may be sustained where the mortgagor disposes of the property but accounts for the proceeds.—*Sabin v. Wilkins*, 450.

4. A debtor gave his wife, to secure a bona fide debt, a chattel mortgage on a stock of goods, which permitted him to retain possession, but forbade any sale of the property, or any part of it, by him. Held, that the mortgage was valid as to attaching creditors, in the absence of a showing that he was permitted, with the knowledge of his wife, to conduct the business in his usual course of trade, or to use the proceeds of sales for his own use in disregard of the mortgage conditions.—*Sabin v. Wilkins*, 450.

VALIDITY AS AGAINST ASSIGNMENT.

5. A debtor who gave his wife a chattel mortgage on a stock of goods, before giving the mortgage, and two days thereafter, told other creditors that if his property was attached he would have to assign. After the mortgage was given, he and such creditors made a contract, whereby he was to pay seventy-five per cent. in full of his indebtedness—twenty-five per cent. in cash in one week, and the balance in secured notes. Six days thereafter he notified them that it was impossible to do so, and on the following day the creditors attached the goods. Just before the attachment he told the creditors that if they would give him time he could pull through. The assignment was made the next day. Held, that the mortgage was not a part of the assignment, rendering the latter void on account of preferring the wife.—*Sabin v. Wilkins*, 450.

CHOSES IN ACTION.

ASSIGNMENT OF CHOSE IN ACTION.

1. The fact that a claim for wages is assigned for collection only does not destroy its validity or affect the right of the holder to sue in his own name.—*Falconio v. Larsen*, 187.

ASSIGNABILITY OF PREFERRED LABOR CLAIMS.

2. The preferential claim given by the act of 1891 for the wages of laborers may be assigned after it has been presented, and the assignee has all the rights of his assignor.—*Falconio v. Larsen*, 187.

CITATION

To Administrator Before Removal. See EXECUTORS, 9.

CITIZEN Under Removal Acts.

Corporation Not a Citizen Under Removal Acts. See WORDS AND PHRASES.

CITY. Same as MUNICIPAL CORPORATIONS.

CLAIM.

Preferential Claim for Wages is Assignable. See CHOSSES IN ACTION, 2.

Assignee of Claim for Wages may Sue. See CHOSSES IN ACTION, 1.

CLAIM—CONCLUDED.

Of Executors for Extra Compensation. See EXECUTORS, 7, 8.

Against Estate for Expenses of Travel. See EXECUTORS, 1, 2, 3.

CLERKS OF COURTS.

DEFAULT JUDGMENT BY CLERK IN VACATION.

1. A judgment entered by a clerk in vacation time for want of an answer is valid—such action by the clerk is not void as being an exercise of judicial power. —*Talbot v. Garretson*, 256.

COUNTY CLERK MAY CONTRACT FOR ELECTION BALLOTS.

2. Under the provisions of section 47 of the election law of 1891—the Australian Ballot Act—the county clerk can hire the ballots printed for an election, and the county must pay the bill, if it is reasonable.—*Flagg v. Marion County*, 18.

CODE CITATIONS. Same as STATUTES OF OREGON.

COMPENSATION

For Property Taken for Public Use—Toll Road. See EMINENT DOMAIN, 2, 3.

To Administrator for Extra Services. See EXECUTORS, 7, 8.

COMPETENCY

Of Parol Evidence to Supplement Records of County Court. See EVIDENCE, 4.

Of Statements by Agent of his Authority. See EVIDENCE, 12.

COMPROMISE AND SETTLEMENT.

Settlement out of court after an action is brought, if made without the knowledge or consent of the attorney for the plaintiff, is to be viewed with suspicion, especially if the defendant knew of a contract giving the attorney supervisory control over the distribution of the collection.—*Falconio v. Larsen*, 187.

CONFIDENTIAL COMMUNICATIONS.

Payment of Client's Money by Attorney. See ATTORNEY AND CLIENT, 3.

CONFLICT OF LAWS.

A marriage between persons sui juris, if valid where solemnized, is generally speaking, valid everywhere, but where two people have married and both are living, neither can contract a valid marriage anywhere unless there shall have been a valid and complete divorce. In Oregon no divorce is complete until the lapse of six months after the rendition of the decree, so that during that period neither party can marry a third person anywhere. Such a union, no matter where contracted, is absolutely void.—*McLennan v. McLennan*, 480.

CONSTITUTION OF OREGON.

Article IV, section 23, *Landis v. Lincoln County*, 424.

Article VI, section 2, *Shattuck v. Kincaid*, 383.

Article IX, section 3, *Northup v. Hoyt*, 528.

Article IX, section 4, *Shattuck v. Kincaid*, 383.

CONSTITUTIONAL LAW.

ENTRY OF DEFAULT JUDGMENT BY CLERK IS VALID.

1. Section 249, Hill's Ann. Laws, which authorizes the clerk, on application of plaintiff, where no answer is filed, to enter the default of defendant, and enter judgment against him for the amount specified in the summons, is not unconstitutional as attempting to confer judicial power on the clerk.—*Talbot v. Garretson*, 256.

SPECIAL AND LOCAL LAWS REGARDING TAXES.

2. The law of 1893, fixing the salaries of the sheriffs in all the counties but one in Oregon (Laws 1893, p. 183), is not void because it is a local or special law in respect to salaries; the generality of application required by article IV, § 23, subdivision 10, of the constitution, refers to the assessment and collection of taxes, not to the fees and salaries of public officers.—*Landis v. Lincoln County*, 424.

CONSTITUTIONAL LAW—CONCLUDED.

LAW INAPPLICABLE RATHER THAN UNCONSTITUTIONAL.

3. When a constitutional provision prevents a statute from applying to certain persons or in certain cases where it apparently was intended to apply, the courts will not declare the statute unconstitutional, but will hold that it was not intended to apply to such persons or cases.—*Northup v. Hoyt*, 514.

CONSTRUCTION

Of Statute by Successive Legislatures. See STATUTES.

Of Ordinances—Garnishment—Limit of Taxing Power—Right to Retain Contractor's Warrants. See MUNICIPAL CORPORATIONS, 6, 11, 12.

Of Pleadings—Advancement of Justice. See PLEADING, 12.

CONTEMPORANEOUS CONSTRUCTION

Of Statute by Legislature Often Controls Courts. See STATUTES, 2, 3.

CONTEMPT.

VIOLATING INJUNCTION.

1. One who has been enjoined by a decree from diverting the waters of a creek or its tributaries is guilty of contempt of court when he directs others to divert water from such tributaries, although he believed that the decree was invalid so far as it pertained to these streams.—*State ex rel v. Lavery*, 77.

AMENDING AFFIDAVIT OF CONTEMPT—VERIFICATION.

2. An affidavit being necessary as the basis of proceedings for contempt for acts not committed in the presence of the court (Hill's Ann. Laws, § 658), an amendment of such affidavit must be accompanied by a verification thereof.—*State ex rel v. Lavery*, 77.

KNOWLEDGE BY STRANGER.

3. A stranger to an injunction, if he has notice or knowledge of its terms, is bound thereby, and may be punished for contempt if he violates its provisions; but the rule is otherwise where the stranger was unaware of the terms of the restraining order.—*State ex rel v. Lavery*, 78.

CONTRACTS.

ACCEPTANCE OF DEED.

1. A deed poll, when accepted by the grantees, becomes the mutual act of the parties, and its terms may be enforced.—*Weaver v. Southern Oregon Company*, 14.

PRESUMPTION OF REASONABLENESS OF PUBLIC CONTRACT.

2. A contract entered into by a county clerk under the power conferred upon him by section 47 of the "Australian Ballot Law" (Laws 1891, p. 23) to cause official ballots to be printed must, in the absence of an affirmative showing to the contrary, be regarded as reasonable and valid.—*Flagg v. Marion County*, 18.

RESCISSON FOR FRAUD—TENDER.

3. It is a rule of almost universal application that where a defrauded party elects to rescind a sale or other contract he must annul it as a whole, and must return the consideration received, so that the parties may be again, as far as possible, on an even footing.—*Orosen v. Murphy*, 114.

EQUITY—RESCISSON—TENDER OF CONSIDERATION.

4. In a suit in equity to rescind a contract voidable for fraud it is not necessary for the plaintiff to return, or offer to return, before suit the consideration received, but it is enough if he deposits it in court.—*Orosen v. Murphy*, 114.

LAW ACTION BASED ON RESCISSON—TENDER.

5. In a law action, based on a rescission of a contract consummated through fraud, the complaint must allege that the consideration has been restored, or that plaintiff is willing to restore.—*Orosen v. Murphy*, 114.

INTENTIONAL WRONG NECESSARY FOR RESCISSON.

6. In order to constitute such fraud as will justify a rescission of a contract, the act or omission by which the undue advantage is said to have been obtained must have been wilful and intentional.—*Whalen v. Tipton*, 566.

MISTAKE—INSUFFICIENT FOR RESCISSON.

7. A mere mistake of one of the parties will not enable him to rescind a contract that has been executed.—*Whalen v. Tipton*, 566.

CONTRACTS—CONCLUDED.**INFERENCE OF AFFIRMANCE—DELAY.**

8. The commencement of a suit to rescind a contract of sale, voidable for fraud, three weeks after the vendor discovered the fraud, is not such an unreasonable delay as to warrant the inference of an affirmance of the agreement on his part.—*Crosen v. Murphy*, 114.

CONTRIBUTORY NEGLIGENCE.

When a Bar to Recovery of Damages. See **NEGLIGENCE**, 1.

Fire Caused by Engine—Evidence—Nonsuit. See **NEGLIGENCE**, 2.

CORPORATIONS. See, also, MUNICIPAL CORPORATIONS.**AUTHORITY OF AGENT TO MORTGAGE.**

1. The directors of a corporation which owned a sawmill and store and a portion of the town site at a place where they were situated, which was at a distance from the office of the company and the residence of all its officers and directors, appointed a general manager, "with full power to manage and conduct the business of the corporation." Such manager conducted the business for some two years, buying logs, manufacturing them into lumber, which he sold, hiring and discharging men, selling town lots, and receiving and disbursing the proceeds of the business. Held, that such manager had authority to execute a mortgage in behalf of the corporation on the town lots and logs and lumber at the mill, all which was held for commercial purposes, to secure the payment of indebtedness contracted in the management of the business.—*Thayer v. Nehalem Mill Company*, 437.

USE OF CORPORATE SEAL.

2. A mortgage executed on behalf of a corporation by a duly authorized agent, and purporting to be under its seal, is not invalid because the seal attached is only a scroll, and not the regularly adopted corporate seal, since it is now settled that a corporate contract does not require a seal unless a similar contract, if made by an individual, would have to be sealed, and in such cases any convenient seal will accomplish the purpose.—*Thayer v. Nehalem Mill Company*, 437.

RESIDENCE OF FOREIGN CORPORATIONS.

3. A company incorporated in one state only, and doing business in another state in compliance with conditions imposed upon foreign corporations as prerequisites to their doing business therein, is neither a citizen nor a resident of the latter state, within the meaning of the act of March 3, 1837 (24 United States Statutes, 552). § 2, as amended and corrected by act of August 12, 1838 (25 United States Statutes, 433), providing for the removal of causes on the ground of nonresidence.—*Koshland v. National Insurance Company*, 206.

RIGHTS OF FOREIGN INSURANCE COMPANIES.

4. The law of 1864 (Hill's Ann. Laws, § 3276) requiring foreign insurance companies to appoint a resident agent was impliedly repealed by the law of 1887 (Hill's Ann. Laws, § 3563-3568) prescribing in detail the conditions on which such corporations may do business in this state, and providing that no company complying therewith shall be excluded.—*Continental Insurance Company v. Ritten*, 336.

5. Where a foreign insurance company complied with the conditions precedent to doing business in the state under laws 1887, p. 118, failure to comply with Hill's Ann. Laws, § 3580, as amended by laws 1889, p. 64, requiring companies doing business in the state to have a general office, did not render a contract made with the company invalid; the requirement of such latter section not being made a condition precedent to doing business.—*Continental Insurance Company v. Ritten*, 336.

JURISDICTION OF STATE COURTS OVER FOREIGN CORPORATIONS.

6. Section 516, Hill's Ann. Laws, which provides that no foreign corporation "is subject to the jurisdiction of a court of this state unless it shall appear or have an agency therein for the transaction of some portion of its business," means that, unless it voluntarily appears, such a corporation must be transacting in this state some part of its corporate business when the action is commenced to sustain the jurisdiction of local courts.—*Furrell v. Oregon Gold Company*, 463.

MANNER OF OBTAINING JURISDICTION OVER FOREIGN CORPORATIONS.

7. In the absence of special provisions relating to service of process on foreign corporations, jurisdiction is obtained over them in like manner as over domestic corporations, and a return of service good as against the latter will, under like circumstances, be good against the former.—*Furrell v. Oregon Gold Company*, 463.

CORPORATIONS—CONCLUDED.

SERVICE ON FOREIGN CORPORATIONS—RETURN ON PROCESS.

8. It is not necessary to the validity of a default judgment rendered against a foreign corporation that the return of the service of summons shall show that the defendant was at the time engaged in business in this state; though that is a jurisdictional fact, it need not appear in the sheriff's return, but may more appropriately appear elsewhere in the record.—*Farrell v. Oregon Gold Company*, 463.

SERVICE ON PRESIDENT OF FOREIGN CORPORATION.

9. A foreign corporation doing business in Oregon is subject to its laws, and hence, as there is no special law relative to service upon it a service upon its president is *prima facie* sufficient, under section 55, Hill's Ann. Laws, though the return does not show he was authorized to represent the corporation.—*Farrell v. Oregon Gold Company*, 463.

10. Under Hill's Ann. Laws, § 55, subdivision 1, the service of a summons on the president of a private corporation, either foreign or domestic, within the county where the cause of action arose, will confer jurisdiction on local courts, regardless of whether that officer either resides or has an office within such county, for the president is "an agent" of his corporation within the meaning of the last part of said subdivision.—*Farrell v. Oregon Gold Company*, 464.

CORPORATE OBLIGATION OF COUNTY.

Claim of State for Taxes. See COUNTIES, 13.

COSTS.

LIABILITY OF COUNTIES IN CRIMINAL CASES.

1. A county is not liable to a person who has been tried and acquitted on a criminal charge for the costs and disbursements incurred in the defense. Section 565, Hill's Ann. Laws, refers to cases where a public corporation sues or is sued for the enforcement of property rights.—*Elsen v. Multnomah County*, 134.

2. Section 2261, Hill's Ann. Laws, referring to costs in criminal cases, does not give defendant on acquittal a claim against the county, on which judgment can be rendered in his favor, but such costs as were incurred in enabling him to make his defense are to be paid by the county to the person rendering the service.—*Elsen v. Multnomah County*, 134.

ISSUING MANDATE WITHOUT PAYING COSTS.

3. After an unreasonable delay in having a mandate issued to the lower court, upon reversal of its judgment, and in proceeding with a new trial, the respondent ought to pay the accrued costs on appeal before the mandate will issue.—*Woodward v. Oregon Railway and Navigation Company*, 423.

COSURETIES.

Parol Agreement as to Relative Liability. See SURETIES, 1.

COUNTIES.

IMPLIED POWER OF COUNTY AGENT.

1. The rule that an agent has the implied power to do for the principal such things as are necessary to carry out the purpose of the appointment applies to an agent of a county as well as to an agent of an individual.—*Flagg v. Marion County*, 18.

PART PAYMENT OF CLAIM AGAINST COUNTY.

2. The mere acceptance of a portion of a claim presented to a county is insufficient to create a presumption that the payment was either made or accepted in full of the claim, within the rule that if a claim presented to a county is allowed in part and rejected as to the residue, and the claimant, knowing of such action, accepts the amount allowed, such acceptance will be considered a satisfaction of the whole.—*Flagg v. Marion County*, 18.

AUTHORITY OF COUNTY CLERK TO CONTRACT FOR PRINTING BALLOTS.

3. The power expressly conferred on the county clerk by section 47 of the statute commonly known as the "Australian Ballot Law" (Laws 1891, pp. 14, 23) to cause the official ballots to be printed, implies the power to bind the county by a contract for such printing, subject to the limitation that the price agreed to be paid must be reasonable.—*Flagg v. Marion County*, 18.

COUNTIES—CONCLUDED.

COUNTY CONTRACTS ARE PRESUMED REASONABLE.

4. A contract made by a county official within the scope of his authority, such as for printing ballots, will be presumed reasonable and valid.—*Flagg v. Marion County*, 18.

LIABILITY OF COUNTIES FOR COSTS.

5. A county is not liable to a person who has been tried and acquitted on a criminal charge for the costs and disbursements incurred in the defense, and that for two reasons: (1) There was no liability at common law, since costs were unknown; and (2) there is no statute conferring the right to recover such items, § 565 of Hill's Ann. Laws not being applicable to criminal actions. This section refers to cases where a public corporation sues or is sued for the enforcement of property rights.—*Elsen v. Multnomah County*, 184.

6. Section 2361, Hill's Ann. Laws, which provides that costs in criminal actions shall be paid by the proper county to the person rendering the services, and be taxed against defendant in case of conviction, does not give defendant on acquittal a claim against the county, on which judgment can be rendered in his favor, but such costs as were incurred in enabling him to make his defense are to be paid by the county to the person rendering the service.—*Elsen v. Multnomah County*, 184.

POWER TO RECALL WARRANTS.

7. Warrants issued by a county court, acting as fiscal agent of the county, in compromise of claims against the county for services rendered, are not judicial decisions upon the validity of the claims; hence the county treasurer is bound by a subsequent order issued by such court prohibiting their payment.—*Frankl v. Badley*, 285.

CHARACTER OF COUNTY WARRANTS.

8. A warrant issued by a county court, while acting as fiscal agent for the county, is only *prima facie* evidence that the municipality is indebted to the holder thereof; it is not conclusive, but is everywhere open to all defenses available as between the original parties.—*Frankl v. Badley*, 285; *Goldsmith v. Baker City*, 249.

RIGHT OF COUNTY TO RECOVER ILLEGAL FEES.

9. Where accounts or claims against a county have been allowed without authority of law, the county court may properly direct the treasurer not to pay them; and if they have been paid, the county may recover the amount.—*Frankl v. Badley*, 285.

COUNTY COURT AS FISCAL AGENT.

10. A county court acting on the expediency and manner of repairing bridges in the public highway is acting as an agent of the county and not as a court.—*Stout v. Yamhill County*, 314.

PAROL EVIDENCE TO SUPPLEMENT RECORDS OF COUNTY COURT.

11. Parol evidence is admissible to supplement the records of a county court as to proceedings of such court when sitting for the transaction of county business, since the court is then acting only as the agent of the county, and in such cases the records do not constitute the only evidence of what was done.—*Stout v. Yamhill County*, 314.

APPORTIONMENT OF MONEYS TO STATE TAXES.

12. The "moneys" referred to in section 2818, Hill's Ann. Laws, requiring county treasurers to pay over to the state treasurer in gold and silver coin the amount of state taxes charged to their respective counties out of the first of "such" moneys collected and paid in to them, means not only the proceeds of the tax levied for state purposes but also the proceeds of the taxes for general county purposes. That expression, however, does not include the result of any taxes levied for specific objects—such as schools or roads.—*Northrup v. Hoyt*, 524.

STATE TAX A CORPORATE OBLIGATION OF COUNTY.

13. The obligation of a county to pay its portion of the state tax creates the relation of debtor and creditor between the county and the state, and the state becomes a preferred creditor to the amount of such tax, payable out of the general fund.—*Northrup v. Hoyt*, 525.

COUNTY CLERK.

Default Judgment by Clerk in Vacation. See CLERKS OF COURTS, 1.

May Bind County for Printing Ballots. See CLERKS OF COURTS, 2.

COUNTY COURTS

Can Forbid Payment of Warrant Already Issued. See COURTS, 1.

When Considering Bridges is only Fiscal Agent. See COURTS, 2.

COUNTY ROADS.

Locating County Road over Existing Toll Road—Compensation—Notice of Intention to Appropriate. See HIGHWAYS, 1, 2, 3.

COURTS.

COUNTY COURTS—FORBIDDING PAYMENT OF WARRANTS.

1. County courts can properly forbid the treasurer to pay warrants that have been issued for claims against the county. In passing on such matters the county court does not act in its judicial capacity. *Frank v. Bailey*, 235.

COUNTY COURTS—BRIDGE REPAIRING.

2. When considering the expediency and manner of building and repairing bridges on the public roads, county courts act only as fiscal agents.—*Stout v. Yamhill County*, 314.

POWER TO COMPEL MUNICIPAL TAXATION.

3. The courts cannot compel municipal corporations to levy taxes in excess of the limit of taxation imposed by their charters, even at the suit of a creditor whose debt will otherwise remain unpaid, unless the charter limitation is such an abridgement of the right of taxation existing at the time the debt was incurred as in effect to impair the obligation of the contract.—*Corbett v. City of Portland*, 407.

HOW JURISDICTION IS OBTAINED OVER FOREIGN CORPORATIONS.

4. Under the provisions of section 516, Hill's Ann. Laws, a local court cannot acquire jurisdiction over a foreign corporation unless it appears or is transacting within this state some part of its corporate business, so that there are persons on whom service of process may be made. Summons should be served on a foreign corporation in like manner as on a domestic corporation, and a service on its president within this state is prima facie correct under section 55, Hill's Ann. Laws, though the return does not show that such officer was authorized to represent the corporation.—*Farrell v. Oregon Gold Company*, 463.

SUPREME COURT—REVERSAL OF EQUITY CASE—PRACTICE.

5. Where it appears that a party has not been afforded an opportunity to present a defense, and that he has not been inexcusably negligent in the matter, the supreme court may, under the terms of section 102, Hill's Ann. Laws, relieve him from the consequences, and remand the case for further proceedings instead of ordering a final decree.—*Smith v. Wilkins*, 421.

ISSUING MANDATE—PAYMENT OF COSTS.

6. After an unreasonable delay in having a mandate issued to the lower court, upon reversal of its judgment, and in proceeding with a new trial, the respondent ought to pay the accrued costs on appeal before the mandate will issue.—*Woodward v. Oregon Railway and Navigation Company*, 423.

TRIAL DE NOVO IN SUPREME COURT.

7. On appeal to the supreme court in an equity suit the original testimony will be reviewed, and the court will draw its own conclusions therefrom, rendering such final decree as may be proper.—*Goldsmith v. Ewert*, 589.

CREDITOR'S SUIT.

RETURN OF EXECUTION SUFFICIENT.

1. A suit to uncover assets fraudulently concealed may be maintained after issuance of an execution and its return nulla bona, without alleging that the debtor is not possessed of other available property.—*Wyatt v. Wyatt*, 581.

NOT SUPERSEDED BY GARNISHMENT LAWS.

2. The general equitable remedy by creditors' bill is not taken away or superseded by the statutory proceeding of garnishment.—*Sabin v. Anderson*, 457; *Mallock v. Babb*, 516.

3. The institution of garnishment proceedings which do not come to trial on their merits is no bar to the prosecution of a creditor's bill.—*Sabin v. Anderson*, 457.

NOT SUPERSEDED BY SUPPLEMENTARY PROCEEDINGS.

4. A judgment creditor's remedy by a suit in equity in the nature of a creditor's bill to uncover assets fraudulently concealed is not superseded by the statu-

CREDITOR'S SUIT—CONCLUDED.

tory provision for proceedings supplementary to execution conferred by Hill's Ann. Laws. §§ 308-312. This latter seems to be particularly designed to reach property which still remains under the control of the debtor.—*Mallock v. Babb*, 516.

ADEQUATE REMEDY—CONFLICTING CLAIMS.

5. Where several defendants separately claim an interest in or a portion of property sought to be reached by the plaintiff an equitable proceeding by creditor's bill is the only adequate remedy, since in no other single suit can all disputes touching the title be settled.—*Mallock v. Babb*, 516.

LIEN OF GARNISHMENT SUFFICIENT.

6. A judgment creditor by the issue of an execution and a levy thereunder acquires a sufficient lien upon property alleged to have been fraudulently conveyed for the purpose of defeating payment of his claim, to base a creditor's suit upon, although he has not exhausted his remedy at law or had the execution returned nulla bona.—*Mallock v. Babb*, 517.

CRIMINAL LAW.

EFFECT OF WAIVING PRELIMINARY EXAMINATION.

1. The waiver of a preliminary examination by one charged with a crime is equivalent to a finding by the committing magistrate that there is probable cause to believe the defendant guilty.—*Hess v. Oregon Baking Company*, 508.

WAIVER OF EXAMINATION AS EVIDENCE.

2. A finding on a preliminary examination that there is sufficient cause for holding the accused to answer is only prima facie evidence of probable cause on a trial for malicious prosecution, and may be overcome by competent evidence.—*Hess v. Oregon Baking Company*, 508.

CROSS APPEAL.

Party not Appealing is Presumably Satisfied. See APPEAL, 14.

DAMAGES.

A person who, by a slight effort and without danger to himself, could have avoided the destruction of his property, but did not do so, is chargeable with such contributory negligence as will prevent his recovery from the person who caused the injury.—*Richmond v. McNeill*, 342.

DEBTOR AND CREDITOR.

Rights of Firm Creditors to Partnership Property. See PARTNERSHIP, 5.

DECEDENT'S ESTATE. Same as EXECUTORS.

DECREES

Must Follow Issues Made by Pleadings. See JUDGMENTS AND DECREES, 6.

DEED.

KIND OF ESTATE CONVEYED.

1. A deed conveying a certain strip of land "for road purposes. * * * The said strip so conveyed for a road as above stated," etc., indicates only an easement in the property described.—*Wason v. Pils*, 9.

EFFECT OF ACCEPTING DEED.

2. A deed poll, when accepted by the grantee, becomes the mutual act of the parties, and its terms may be enforced.—*Weaver v. Southern Oregon Company*, 14.

MENTAL INCAPACITY TO EXECUTE.

3. To invalidate a conveyance on the ground of mental incapacity it must appear that the grantor was in such a state of mental weakness as to be incapable of fully comprehending the nature and effect of the transaction.—*Carnegie v. Diven*, 366.

DEFALCATION.

Of Sheriff—General and Special Bonds. See OFFICERS, 2.

DEFAULT.

Judgment by Clerk in Vacation is Valid. See JUDGMENTS, 5.

DEFINITIONS. Same as WORDS AND PHRASES.

DIRECTING VERDICT

For Insufficient Evidence. See TRIAL, 2.

DISCRETION OF COURT.

Allowance of Extra Compensation to Administrators. See EXECUTORS, 7.

Discretion of Court Defined. See WORDS AND PHRASES.

Setting Aside Judgment for Surprise or Excusable Neglect. See JUDGMENTS, 3.

Amendments to Pleadings on Appeal from Justice's Courts. See PLEADING, 2.

Amending Pleading Before Trial—New Cause of Action. See PLEADING, 6.

Amending Complaint by Dropping Parties Defendant. See PLEADING, 7, 8.

Amending Complaint After Motion for Nonsuit. See PLEADING, 9.

DIVERSE CITIZENSHIP. Same as REMOVAL OF CAUSES.

DIVERSION OF WATERS. Same as WATERS.

DIVORCE

A marriage contracted in another state by a resident of Oregon within the time limited by law for appealing from a divorce decree here is absolutely void.—*McLennan v. McLennan*, 480.

EASEMENT.

A deed conveying a certain strip of land "for road purposes. * * * The said strip so conveyed for a road as above stated," etc., indicates only an easement in the property described.—*Wason v. Pitt*, 9.

ELECTIONS.

The power expressly conferred on the county clerk by section 47 of the statute commonly known as the "Australian Ballot Law" (Laws 1891, pp. 14, 23) to cause the official ballots to be printed, implies the power to bind the county by a contract for such printing, subject to the limitation that the price agreed to be paid must be reasonable.—*Flagg v. Marion County*, 18.

EMINENT DOMAIN.

PROPERTY ALREADY IN PUBLIC USE.

1. While it is true that property already appropriated to public use may be again seized for a different purpose of the same kind, yet this can be done only by an express provision of statute, or by necessary implication.—*Little Nemucca Road Company v. Tillamook County*, 1.

COMPENSATION FOR PROPERTY TAKEN FOR PUBLIC USE.

2. Where a person or corporation in whose behalf private property has been taken under the right of eminent domain has acquired an interest by reason of money or improvements expended on such property, compensation must be made for such interest before the property thereby affected can be appropriated to a new public use.—*Little Nemucca Road Company v. Tillamook County*, 1.

APPROPRIATION OF TOLL ROAD—PAYMENT OF COMPENSATION.

3. Before a county court can appropriate a toll road to the use of the public, it must pay the compensation provided by law.—*Little Nemucca Road Company v. Tillamook County*, 2.

EQUALIZATION.

Power of County Court in Correcting Assessments. See TAXATION, 4.

Power of Board of Equalization to Correct Roll. See TAXATION, 5.

EQUITY.

EQUITABLE RELIEF AGAINST WRONG DESCRIPTION.

1. Where, by mutual mistake, a deed describes property other than that purchased, and the land described in the deed is sold on execution against the vendee, the sale is void; and equity cannot, at the instance of a grantee of a purchaser at the execution sale, correct the error so as to give him title to the land actually purchased by the vendee.—*Burrows v. Parker*, 57.

EQUITY—CONTINUED.

RELIEF FROM FRAUDULENT TRANSFER.

2. Where an owner of property made a lease thereof in the name of his wife to defraud creditors, she did not thereby acquire title; and hence the rule that equity will not lend its aid to a seller of personal property transferred in fraud of creditors, when he seeks to recover it, does not apply in a suit wherein the husband asserts his title.—*Perkins v. McCullough*, 69.

RESCISSIO—TENDER OF CONSIDERATION.

3. Where a suit is brought to rescind a sale or other contract on the ground of fraud the plaintiff need not, before suit, offer back the consideration received; it is enough that he produces it for defendant at the time of trial.—*Crosen v. Murphy*, 114.

LOSS OF JURISDICTION BY CHANGE OF CONDITIONS.

4. A court of equity which has jurisdiction of a cause at its inception does not lose it because prior to the decree the situation is so changed by the acts of the defendants as to render it possible for a court of law to grant the same relief. Equity in such a case will adjust the entire matter and do justice to all parties.—*Crosen v. Murphy*, 114.

JURISDICTION OF EQUITY TO GRANT RELIEF AGAINST JUDGMENT.

5. A denial of an application under section 102 of Hill's Ann. Laws to vacate a judgment on the ground of inadvertence, surprise, or excusable neglect is a bar to a suit in equity for the same relief on the same ground.—*Thompson v. Connell*, 232.

RESTORING MORTGAGE LIEN.

6. Before a court of equity can restore the lien of a mortgage canceled by mistake it must appear that at the time of such release the mortgagee did not know of the intervening lien over which he desires to obtain priority.—*Talbot v. Garretson*, 256.

SETTING ASIDE CONVEYANCE FOR MENTAL WEAKNESS.

7. Neither a grantor nor his heirs can impeach a conveyance as voluntary unless at the time the conveyance was executed the grantor was in such a state of mental weakness as to be incapable of fully understanding the nature and effect of the transaction.—*Cornagie v. Diven*, 366.

GARNISHMENT NOT SAME AS CREDITOR'S SUIT.

8. The right to prosecute in a court of equity a creditors' bill to uncover assets fraudulently conveyed, and to compel an accounting, was not superseded by the garnishment and attachment laws nor by proceedings supplementary to execution, since a legislative intention that it should be so superseded does not appear, and in the absence of such intent the jurisdiction of equity is not abrogated by the creation of a new legal remedy.—*Sabin v. Anderson*, 487; *Mallock v. Babb*, 516.

ADEQUATE REMEDY AT LAW.

9. Garnishment and attachment statutes do not afford an adequate remedy at law to uncover assets fraudulently concealed, and to compel an accounting, for by their means the creditor cannot, as he can by a creditor's bill in equity, both unmask the fraud and prevent the disposal of the property during litigation.—*Sabin v. Anderson*, 487.

10. Where several defendants separately claim an interest in or a portion of property sought to be reached by the plaintiff an equitable proceeding by creditor's bill is the only adequate remedy, since in no other single suit can all disputes touching the title be settled.—*Mallock v. Babb*, 516.

ACCOUNTING BY FRAUDULENT GRANTEE—CREDITS.

11. A banker who knowingly received notes on deposit from a failing debtor, in pursuance of a scheme to defraud the creditors of the latter, and issued therefor a negotiable certificate of deposit, under an agreement that it was to be paid from the proceeds of such notes, will not, in a suit by creditors for an accounting, be credited with an amount secretly paid to get back such certificate, because he feared the debtor would transfer it.—*Sabin v. Anderson*, 487.

ENJOINING EXECUTION ON FRAUDULENT JUDGMENT.

12. A court of equity has jurisdiction to restrain the enforcement of an unreasonable judgment procured through fraud, or unavoidable accident, or excusable mistake.—*Handley v. Jackson*, 552.

GROUND OF EQUITABLE RELIEF.

13. The party invoking such jurisdiction must not only show some adequate ground of interference with the judgment, but must also disclose a meritorious

EQUITY—CONCLUDED.

and sufficient defense to the law action, or at least to some substantial part thereof.—*Handley v. Jackson*, 552.

RELIEF AGAINST APPEARANCE BY UNAUTHORIZED ATTORNEY.

14. The enforcement of a judgment dependent upon the appearance of an unauthorized attorney for a party who was not served with summons may be restrained in equity, irrespective of whether the attorney is responsible financially, or acted by collusion with the other party.—*Handley v. Jackson*, 552.

ERROR.

Harmless Error not Reversible Error. See HARMLESS ERROR.

ESTATES OF DECEDENTS. Same as EXECUTORS.

ESTOPPEL.

ON RETIRING PARTNER TO USE FIRM NAME.

1. A retiring partner who agreed that the other member of the firm should have the sole right to settle the partnership business and use the firm name was not thereby estopped from suing in the firm name to recover a firm debt, for no interest in the partnership property was thereby transferred, but only an agency, and the power that created that relation was equally competent to destroy it.—*Rippen v. Investment Company*, 36.

ESTOPPEL TO CHANGE POSITION AFTER SUIT.

2. After a party to a controversy has assumed a position he cannot during the progress of litigation change his ground, as, for example, in a replevin action for goods in store, the warehouseman cannot answer denying plaintiff's ownership, and then on the trial claim to hold the property under a lien for storage.—*Wyatt v. Henderson*, 49.

INSUFFICIENCY OF ESTOPPEL.

3. Plaintiff, by making favorable representations to defendant of the desirability of his neighborhood for settlement, and by discussing methods for irrigation, and stating that he thought the water supply from the creek was sufficient for them both, and making no objection to his use of water therefrom, is not estopped to claim a superior right to so much of the water as prior to and during all such time he had been using for beneficial purposes to the knowledge of defendant.—*Smyth v. Neal*, 105.

EVIDENCE.

IMMATERIAL EVIDENCE.

1. Warehouse receipts are inadmissible on behalf of a warehouseman to show the quantity of goods delivered to him, in an action for such goods by one who does not claim under the receipts, or the person to whom they were issued.—*Wyatt v. Henderson*, 49.

EVIDENCE OF SALE.

2. An alleged division of property held in the name of a husband, made between him and his wife, because she had helped earn it and acquired an interest therein, testified to by the wife, when there is neither written evidence of such transfer nor change of possession, is not sufficient proof of a sale to her, when her testimony is contradicted by the husband.—*Perkins v. McCullough*, 59.

OPENING SETTLED ACCOUNTS—BURDEN OF PROOF.

3. One who seeks to surcharge and falsify a settled account has the burden of proof to establish the facts alleged.—*Fisk v. Basche*, 178.

RECORDS OF COUNTY COURT—PAROL EVIDENCE.

4. Parol evidence is admissible to supplement the records of a county court as to proceedings of such court when sitting for the transaction of county business, since the court is then acting only as the agent of the county, and in such cases the records do not constitute the only evidence of what was done.—*Stout v. Yamhill County*, 814.

BURDEN OF PROOF TO SHOW FRAUD.

5. One who alleges an apparently valid conveyance to be fraudulent has the burden of proof to support the claim.—*Sabin v. Wilkins*, 450.

EVIDENCE—CONCLUDED.

WARRANT AS EVIDENCE OF A CLAIM.

6. A warrant is only prima facie evidence of the validity of a claim against a city, county, or state.—*Shattuck v. Kincaid*, 379.

WAIVER OF EXAMINATION AS EVIDENCE.

7. A finding on a preliminary examination that there is sufficient cause for holding the accused to answer is only prima facie evidence of probable cause on a trial for malicious prosecution, and may be overcome by competent evidence.—*Hess v. Oregon Baking Company*, 503.

UNAUTHORIZED APPEARANCE OF ATTORNEY—EVIDENCE ALIQUIDE.

8. In a proceeding to restrain the enforcement of a judgment on the ground that the only appearance of an unserved defendant was by an unauthorized attorney, it is competent to hear evidence aliunde, offered for the especial purpose of rebutting the presumption of authority in the attorney.—*Handley v. Jackson*, 562.

ADMISSIBILITY OF EVIDENCE.

9. Evidence that a deed of land was given to plaintiff as a matter of convenience and in trust for defendant, although not pleaded, is admissible to rebut evidence by plaintiff that defendant and he purchased the land together.—*Willis v. Abraham*, 562.

10. A defendant, having denied that he ever entered into a transaction wherein he agreed to pay plaintiff a part of the proceeds of certain lots, may, without pleading payment or release, introduce in evidence a receipt made by plaintiff to him, purporting to be "in full of all accounts to date, including all demands, of whatsoever nature," in order to show the improbability that such a transaction existed prior to the date thereof.—*Willis v. Abraham*, 562.

EVIDENCE OF PAYMENT OF INSURANCE PREMIUM.

11. The evidence in this case is sufficient to show a payment of the premium of insurance, even under the peculiar terms of the policy.—*Wicktorvits v. Farmers' Insurance Company*, 569.

PROOF OF AGENCY.

12. The rule that the statements of an agent are not competent to prove his own agency applies only to such statements when made out of court, and does not restrict the right of a person to testify concerning the nature and extent of his agency for another.—*Wicktorvits v. Farmers' Insurance Company*, 569.

ADMISSIONS OF AGENT—WHEN BINDING.

13. To have an agent's admissions bind his principal they must have been made in connection with some act as agent; thus, a statement by a general manager of a corporation, made in the course of a private conversation, and not in connection with or as part of any official duty, is not competent evidence of the matter stated, against the principal.—*Wicktorvits v. Farmers' Insurance Company*, 569.

EXAMINATION.

Effect of Waiving—Action for Damages. See MALICIOUS PROSECUTION.

EXCEPTIONS, BILL OF

Effect of Death of Trial Judge Without Signing. See JUDGMENTS, 2.

Papers not in Judgment Roll—Bill of Exceptions Necessary. See APPEAL, 9.

Necessary to Obtain Review of Findings of Fact. See APPEAL, 10.

EXCUSABLE NEGLIGENCE

As a Reason for Setting Aside a Judgment. See JUDGMENTS, 2.

EXECUTION

VOID SALE—WRONG DESCRIPTION.

1. Where, by mutual mistake, a deed describes property other than that purchased, and the land described in the deed is sold on execution against the vendee, the sale is void.—*Burrows v. Parker*, 57.

MARRIED WOMEN—LEVY OF EXECUTION AGAINST HUSBAND.

2. In view of the liberal statutes in Oregon relating to married women, personal property transferred by a husband to his wife is not in his possession so that it can be seized under a writ against him.—*Wyatt v. Wyatt*, 581.

EXECUTION—CONCLUDED.

SUPPLEMENTARY PROCEEDINGS.

3. The remedy by proceedings supplementary to execution does not take the place of a creditor's suit, the statutory remedy being particularly designed to reach property still in the hands of the debtor.—*Mallock v. Babb*, 517.

ENFORCEMENT OF UNCONSCIONABLE JUDGMENT.

4. A court of equity will enjoin an execution issued on an unconscionable judgment obtained by fraud, or through the unauthorized appearance of an attorney.—*Handley v. Jackson*, 552.

EXECUTORS AND ADMINISTRATORS.

ACCOUNTS—EXPENSES OF TRAVEL.

1. An administrator who, before decedent's death, visited him at his request, is not entitled to charge the estate for his expenses, when no promise of payment by decedent is shown, and the parties were relatives and on friendly terms; but the administrator is entitled to payment for traveling expenses incurred on a visit to the executrix, at her request, to consult as to the proper management of the estate.—*Re McCullough's Estate*, 86.

2. A nephew who persuaded his uncle to accompany him on a dangerous trip, and paid his expenses, cannot recover from the uncle's estate the amount of the expenses, although the uncle had agreed to repay them, inasmuch as the uncle went merely to accommodate the nephew and for the latter's increased safety.—*Re McCullough's Estate*, 86.

3. An administrator who makes a charge of \$100 against an estate for expenses incurred and time employed on a business journey connected therewith, and an additional charge of \$30 for making a subsequent trip to the same place, will be allowed but \$60 for both trips, when it appears that the expenses incident to the journey do not exceed \$30.—*Re McCullough's Estate*, 86.

POWER OF EXECUTOR TO CONTRACT FOR ATTORNEY'S FEES.

4. One who is acting in a representative capacity cannot bind the estate over which he has control except for expenses of protecting it or by statutory authority. Within this rule an administrator may, under section 1178, Hill's Ann. Laws, allowing reasonable attorney fees for necessary litigation, contract with an attorney to undertake litigation for a liberal fee contingent on success.—*Re McCullough's Estate*, 86.

ATTORNEY'S FEES AGAINST ESTATES.

5. An attorney may be allowed his expenses necessarily incurred in travel for the estate which he represents, and a gross sum for all his services. This method of fixing compensation is preferable to allowing claims for different services as they are performed. It is desirable, too, that as few attorneys should be employed as is consistent with the amount and condition of the estate—ordinarily one is sufficient.—*Re McCullough's Estate*, 86.

6. An item in an administrator's final account of money paid to his attorney for making an inventory may be rejected when such attorney is allowed a gross sum for his services in the management and settlement of the estate.—*Re McCullough's Estate*, 86.

EXTRA COMPENSATION.

7. The allowance of extra compensation to an administrator for services rendered in the discharge of his duties is a matter largely within the discretion of the county court (section 1180, Hill's Ann. Laws), and the amount so awarded will not be disturbed on appeal, unless there has been a manifest abuse of discretion, or the amount so allowed is disproportionate or not equivalent to the services performed.—*Re McCullough's Estate*, 86; *Re Partridge's Estate*, 297.

8. In presenting a claim for extra compensation an administrator should particularly state the services on which it is based with such explanations as will enable interested persons to fairly understand the situation.—*Re Partridge's Estate*, 297.

REMOVAL OF ADMINISTRATOR.

9. Under the provisions of sections 1049 and 1100, Hill's Ann. Laws, an administrator should be cited to appear and show cause why he should not be removed, but these requirements are sufficiently complied with where there is a hearing on objections to the officer's reports, and if good cause appears in this proceeding the court may summarily remove the administrator.—*Re Partridge's Estate*, 297.

FRAUD AND FRAUDULENT CONVEYANCES. 621

EXTRA ALLOWANCE

To Executors or Administrators for Special Services. See EXECUTORS, 7.

FEDERAL COURTS

Jurisdiction Derived from Citizenship. See REMOVAL OF CAUSES, 2, 3.

FEES

Illegally Paid may be Recovered by County. See COUNTIES, 9.

Of Sheriff of Lincoln County under Act of 1898. See STATUTES, 12.

Law Fixing Sheriffs' Fees is Constitutional. See STATUTES, 13.

FENCES

RAILROADS—INJURY TO STOCK.

1. If stock enter upon a railway at a point where the statute requires the road to be fenced, and are injured by a moving train, the company will be liable in damages, regardless of whether it was negligent; but if stock enter on the right of way at a place where the company is not bound to fence, and are injured, negligence must be shown to justify a recovery.—*Eaton v. McNeill*, 128.

TRESPASS BY STOCK AND SHEEP IN GILLIAM COUNTY.

2. Since the passage of the act of 1872 (Hill's Ann. Laws, §§ 3452-3455) relating to trespass by horses and cattle in Umatilla and Wasco counties, the common law prevails there on the subject of trespass by stock, except horses and cattle. It is therefore not now necessary to show a lawful fencing before damages can be had for trespass by sheep.—*Strickland v. Gelde*, 373.

FIRE INSURANCE. Same as INSURANCE.

FOREIGN CORPORATIONS.

Insurance Companies Need not Record Power of Attorney. See STATUTES, 8.

Local Head Office not Required. See STATUTES, 9.

How Jurisdiction is Acquired by Local Courts See CORPORATIONS, 6, 7, 8, 9, 10.

FRAUD AND FRAUDULENT CONVEYANCES.

EQUITY—FRAUDULENT TRANSFER.

1. Where an owner of property made a lease thereof in the name of his wife to defraud creditors, she did not thereby acquire title; and hence the rule that equity will not lend its aid to a seller of personal property transferred in fraud of creditors, when he seeks to recover it, does not apply in a suit wherein the husband asserts his title.—*Perkins v. McCullough*, 69.

RESCISSION OF CONTRACT FOR FRAUD—TENDER.

2. It is a rule of almost universal application that where a defrauded party elects to rescind a sale or other contract on which something has been paid he must annul it as a whole, and must return the consideration received, so that the parties may be again, as far as possible, on an even footing, but the time and manner of tendering back such part payment will depend somewhat on whether the proceeding be at law or in equity.—*Crosen v. Murphy*, 114.

INFERENCE OF AFFIRMANCE BY DELAY.

3. The commencement of a suit to rescind a contract of sale, voidable for fraud, three weeks after the vendor discovered the fraud, is not such an unreasonable delay as to warrant the inference of an affirmance of the agreement on his part.—*Crosen v. Murphy*, 114.

RESCISSION OF FRAUDULENT SALE.

4. Plaintiff was in the retail business with a partner, in whose name the lease of the building was made out. The partner, by collusion with members of a mercantile company, sold them his interest and transferred to them the lease. They thereupon gave plaintiff four days' notice to vacate the premises, and offered to buy his interest in the business, giving in part payment certain notes, representing them as first class paper, and also offered to employ him as clerk until the balance of the purchase price should be paid. Plaintiff accepted, and the contract was executed, but he was almost immediately discharged, and the notes proved to be worthless. Held, that the circumstances justified a rescission of contract for fraud.—*Crosen v. Murphy*, 114.

FRAUD AND FRAUDULENT CONVEYANCES—CONCLUDED.

EVIDENCE OF FRAUD.

5. An allegation that defendants were guilty of fraud in an action to recover land in introducing in evidence a deed of plaintiff's ancestor to defendants' predecessors, when such deed had, in another action, been adjudged void, is not sustained where the only effect of the judgment in such other action was to determine that the land there in controversy was not in fact a part of that conveyed by such deed.—*Lovejoy v. Willamette Electric Company*, 181.

MORTGAGE VOID BY CONDUCT OF PARTIES.

6. A mortgage given originally as a security for a genuine debt may be rendered invalid by the subsequent action of the parties. Such will be the result whenever their mutual conduct enables the mortgagor to hinder and delay creditors in reaching property that is lawfully subject to their demands.—*Sabin v. Wilkins*, 450.

RETENTION OF POSSESSION BY MORTGAGOR.

7. In Oregon a chattel mortgage is void as against attaching creditors whenever it appears either upon the face thereof or by extrinsic evidence that the mortgagor has been authorized to dispose of the property in the usual course of trade for his own benefit.—*Sabin v. Wilkins*, 450.

8. A chattel mortgage that allows the mortgagor to retain possession of the property pledged, and to dispose of it, will be sustained if the proceeds of the sales are applied for the benefit of the mortgagees.—*Sabin v. Wilkins*, 450.

DELAYING OTHER CREDITORS.

9. The fact that a mortgage lessens the chances of other creditors for realizing the amount of their claims does not of itself render the transaction void.—*Sabin v. Wilkins*, 450.

FRAUDULENT CONVEYANCE—BURDEN OF PROOF.

10. A creditor assailing an apparently valid chattel mortgage of his debtor on the ground that by extrinsic agreement or subsequent contract unlimited power of disposition for his own use and benefit was conferred upon the mortgagor must establish his contention in that respect, the presumptions are against him.—*Sabin v. Wilkins*, 450.

FRAUD AS A GROUND OF RESCISSION.

11. A deed executed in pursuance of a contract for the exchange of property will not be canceled on the ground that the grantor was induced to make the exchange by false and fraudulent representations by the grantee as to the amount due on a mortgage on the property received in exchange, where there is nothing to show that the grantee's statement as to the amount due was not made in good faith and with an honest belief that it was true, and the passbook issued by the loan association owning the mortgage, containing all the facts upon which to compute the amount actually due, was submitted to the grantor and examined by him.—*Whalen v. Tipton*, 566.

12. In order to constitute such fraud as will justify a rescission of a contract, it is necessary that the act or omission by which the undue advantage was obtained shall have been intentional.—*Whalen v. Tipton*, 566.

TRUSTEES OF FRAUDULENT GRANTOR.

13. A banker who, with knowledge of a debtor's insolvency, accepts from him sundry notes, nominally for collection, but issues a negotiable certificate of deposit for their face, with a secret agreement that the certificate shall not be transferred and then clandestinely buys it in at a discount, is a trustee of the funds collected and is personally liable therefor to the judgment creditors of such debtor.—*Sabin v. Anderson*, 487.

14. Such trustee will not, in a suit by creditors for an accounting, be credited with an amount secretly paid to get back such certificate, because he feared the debtor would transfer it.—*Sabin v. Anderson*, 487.

FRAUDS, STATUTE OF. Same as STATUTE OF FRAUDS.

FUND. See WORDS AND PHRASES.

GARNISHMENT.

Garnishee is a "Party" to an Attachment Action. See ATTACHMENT, 1.

Proceeding Described is not a Garnishment of the City. See ATTACHMENT, 2.

GENERAL ASSIGNMENT FOR CREDITORS.

Entirely Disallowing Assignee's Final Report not Correct Practice. See ASSIGNMENTS FOR CREDITORS, 1.

GILLIAM COUNTY.

Fences—Trespass by Sheep and Cattle—Damages. See TRESPASS.

HARMLESS ERROR.

SLIGHT MISTAKE IN COMPUTATION.

1. A mistake of \$2.00 in a decree is not of enough importance to call for either a reversal or a modification.—*Steel v. Furrell*, 169.

SMALL RECOVERY OF DAMAGES.

2. Error in admitting evidence that plaintiff was damaged in a large sum is manifestly harmless where the recovery is for only a small amount.—*Strickland v. Gelde*, 578.

EVIDENCE SUPPORTING ADMITTED ALLEGATION.

3. The erroneous admission of evidence offered in support of an allegation in the complaint which is not denied in the answer is not prejudicial to the defendant.—*Koshland v. Hartford Insurance Company*, 402.

ARGUMENTATIVE PLEADINGS.

4. The refusal to strike out of an answer certain allegations that constituted an argumentative denial was harmless, where the allegations were such as could have been proven under the specific denials.—*Willis v. Abraham*, 562.

HIGHWAYS.

LOCATING HIGHWAY ON EXISTING TOLL ROAD—COMPENSATION.

1. Under the general power to lay out and establish public highways a county court cannot locate a highway over land previously appropriated for a toll road, without rendering compensation according to law for the property.—*Little Nestucca Road Company v. Tillamook County*, 1.

NOTICE—APPROPRIATION OF TOLL ROAD.

2. The proceeding provided by section 3284 of Hill's Ann. Laws for appropriating to public use the property of a toll road company is a hostile one, and the petition and notice required by section 4062 for locating a county road, must be given as in ordinary cases.—*Little Nestucca Road Company v. Tillamook County*, 1.

HOMESTEAD.

The homestead act (Rev. St. U. S. § 2296), providing that no lands acquired thereunder "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," merely prevents the unwilling appropriation of the land to the satisfaction of such debts, and does not prevent the homestead claimant, after issuance of the final certificate, and before patent, from giving a mortgage on the land for a debt then contracted or theretofore existing.—*Howard v. Reckling*, 161.

HORSES—Trespass by, in Gilliam County. See TRESPASS.

HUSBAND AND WIFE.

LIABILITY OF HUSBAND FOR WIFE'S SUPPORT.

1. In a proceeding under Laws 1889, p. 92, to compel a husband to contribute to his wife's support, the wife, if living apart from her husband, must allege and prove that the separation is without her fault, and that he has, without just cause, neglected or refused to support her.—*Fowler v. Fowler*, 66.

MARRIED WOMEN—LEVY OF EXECUTION AGAINST HUSBAND.

2. In view of the liberal statutes in Oregon relating to married women, personal property transferred by a husband to his wife is not in his possession so that it can be seized under a writ against him.—*Wyatt v. Wyatt*, 581.

INADVERTENCE

As a Ground for Vacating a Judgment. See JUDGMENTS, 2.

Denial of Motion to Open Judgment Bars Equity Suit. See JUDGMENTS, 4.

IMPLIED AUTHORITY of Agent.

Powers Necessary to Effectuate Instructions. See AGENTS, 1, 8.

INCONSISTENT PLEADINGS.

Remedy is by Motion for Judgment. See PLEADING, 2.

INCUMBRANCE on Government Homestead.

Voluntary Incumbrance is Valid Before Patent. See PUBLIC LANDS.

INFERENCES.**AFFIRMANCE OF FRAUDULENT CONTRACT.**

1. A lapse of three weeks in commencing a suit in avoidance of a fraudulent sale is not sufficient delay to justify an inference of affirmance. *Crosen v. Murphy*, 114.

INFERENCE OF FIRE FROM ENGINE SPARKS.

2. Evidence tending to show that a railway company negligently left along its track combustible material, which was discovered to be on fire soon after the passing of a train, and plaintiff thereby suffered damage, raises an inference that the fire was caused by sparks from the engine, which the company must rebut.—*Richmond v. McNell*, 342.

INFERENCE OF MENTAL INCAPACITY.

3. It cannot be inferred from the fact of extreme old age that a grantor was mentally incapacitated to execute a conveyance.—*Carnegie v. Diven*, 336.

INJUNCTION.**AGAINST JUDGMENT ON APPEARANCE BY UNAUTHORIZED ATTORNEY.**

1. The enforcement of a judgment dependent upon the appearance of an unauthorized attorney for a party who was not served with summons may be restrained in equity, irrespective of whether the attorney is responsible financially, or acted by collusion with the other party.—*Handley v. Jackson*, 532.

GROUND OF EQUITABLE RELIEF.

2. The party invoking such jurisdiction must not only show some adequate ground of interference with the judgment, but must also disclose a meritorious and sufficient defense to the law action, or at least to some substantial part thereof.—*Handley v. Jackson*, 532.

INJURY TO STOCK.

Liability of Railroads—Fence Requirements. See RAILROADS, 1.

INSOLVENTS AND INSOLVENCY.**ASSIGNABILITY OF A PREFERRED CLAIM FOR LABORER'S WAGES.**

1. The preferential claim for wages of laborers given by the act of February 20, 1891, against the estates of insolvents (Laws, 1891, p. 82) is, after presentation, assignable, and, when assigned, the assignee may maintain suit thereon in his own name.—*Falconio v. Larsen*, 137.

INSOLVENT ESTATE—LIEN OF CREDITOR FOR UNPAID DIVIDENDS.

2. Where a creditor fails to avail himself of an order of court directing a receiver of an insolvent institution to distribute money in his hands as such receiver, the creditor does not thereby obtain a lien upon the remaining assets for his pro rata share in such fund.—*Rockwell v. Portland Savings Bank*, 431.

LIEN ON INSOLVENT ESTATE FOR TRUST FUNDS.

3. In order to impress upon the assets of an insolvent estate a lien for trust funds it must appear either that the identical fund is still among the assets awaiting distribution, or that the property sought to be subjected to the lien includes such funds or their proceeds; thus, where a receiver was appointed for an insolvent bank pendente lite, the funds ordered to be distributed were not called for by certain creditors, and on dismissal of the suit, were returned to the bank and expended by it in the usual course of its business, and the bank itself afterwards declared other dividends in favor of the same creditors, which were not claimed, and were also expended, all such dividends lost their identity as trust funds and did not pass to a subsequent receiver of the bank as particular funds.—*Rockwell v. Portland Savings Bank*, 431.

INSOLVENTS AND INSOLVENCY—CONCLUDED.

MAY PREFER A CREDITOR.

4. A debtor in failing circumstances may in Oregon prefer one creditor over another in any manner that he may choose if he does not resort to a general assignment or to devices which being construed in unison may be regarded as equivalent thereto.—*Sabin v. Watkins*, 450.

INSURANCE.

DESCRIPTION OF PROPERTY.

1. It is not necessary, in an insurance policy, that the locality be fixed or established by such technical legal description as are usually employed in conveyances of title; thus, where a policy described the property, as "a frame dwelling house situated on and confined to the premises now actually owned and occupied by assured, to wit: Lots 27 and 28, block 8, in Harlington Addition to Mt. Tabor," and the proof showed the correct description to be the same numbered lots and block in Harlem Addition to East Portland, and there was no such place as "Harlington Addition to Mt. Tabor," the variance is not fatal, since, after eliminating the erroneous portion of the description, enough remains to identify the property.—*Baker v. State Insurance Company*, 41.

WARRANTY OF OWNERSHIP.

2. A warranty that the insured is the sole and undisputed owner of the insured property and that the title to the land is in her name, is not broken by the fact that legal title has not been conveyed to the insured, where she has gone into possession under a contract of purchase and has performed on her part all the conditions thereof to the date of application, as the term "title" is to be construed in the ordinary acceptance of the term.—*Baker v. State Insurance Company*, 42.

EFFECT OF UNTRUE STATEMENT OF VALUE.

3. A false statement as to the value of the property will not invalidate the policy, if given in good faith as the honest opinion of the insured.—*Baker v. State Insurance Company*, 42.

NEW MORTGAGES IN LIEU OF OLD ONES.

4. Where property has been insured with knowledge of existing incumbrances, the mortgaging of such property without the consent of the company to provide funds which are used to pay off the existing incumbrance is not a violation of a provision that the policy shall be void "if the subject of the insurance be or become incumbered by mortgage."—*Koshland v. Home Insurance Company*, 321.

5. A subsequent change in the form of the incumbrances on insured property, which were known when the policy was issued, will not work a forfeiture of the policy, so long as the amount is not increased.—*Koshland v. Home Insurance Company*, 321.

MISREPRESENTATION AND CONCEALMENT.

6. A failure to disclose the existence of a mortgage on property sought to be insured, when the applicant is not interrogated upon that subject, is not such concealment, misrepresentation, or failure to state the interest of the insured as will render the policy void.—*Koshland v. Hartford Insurance Company*, 402.

MORTGAGE AS A VIOLATION OF CONDITIONS OF POLICY.

7. A provision in a policy of insurance that it shall be void "if any change other than the death of the assured take place in the interest, title, or possession of the subject of insurance, except change of occupants without increase of hazard, whether by legal process of judgment, or by voluntary act of the insured, or otherwise," is not violated by a subsequent mortgage on the property covered by the policy.—*Koshland v. Hartford Insurance Company*, 403.

NEW INCUMBRANCE.

8. An insurance policy the terms of which provide that it shall be void "if the hazard be increased" is not forfeited where a mortgage is given in lieu of and for the purpose of discharging incumbrance on the property which the insurance company was informed of at the time the insurance was effected.—*Koshland v. Fire Association*, 362.

REPEAL OF STATUTE—RECORDING POWER OF ATTORNEY.

9. Sections 8 and 9 of the law of 1864, requiring foreign insurance companies doing business in Oregon to execute and record a power of attorney in each county where they should have resident agents (Laws 1864, p. 745, Hill's Ann. Laws, § 3276), were impliedly repealed by the statute of 1887 on the same subject (Laws

INSURANCE—CONCLUDED.

1887, p. 118, Hill's Ann. Laws, §§ 3563-3566. This latter statute prescribed in detail the conditions on which foreign insurance companies might be admitted into this state, and is plainly a substitute for the prior law so far as it refers to appointing a person on whom service of summons may be made.—*Continental Insurance Company v. Riggan*, 336.

FOREIGN INSURANCE COMPANIES.

10. The requirement of section 3580, Hill's Ann. Laws, as amended (Laws 1898, p. 64), that every foreign fire and marine insurance company doing business in this state shall have one head office in the state under the charge of a general agent, is not a condition precedent to the right of such company to do business in this state, and a failure to comply therewith will not render void and unenforceable a contract of such company made while carrying on business here under a license regularly issued by the insurance commissioner, although it might afford some ground for a proceeding by the state.—*Continental Insurance Company v. Riggan*, 337.

PAYMENT OF INSURANCE PREMIUM—EVIDENCE.

11. Under a provision in a policy of insurance that, unless the premium be paid at the company's home office at the time the policy was issued (such payment to be evidenced only by the president's receipt accompanying the policy), or within thirty days thereafter by check or draft direct to the company, payable to the president, the policy should be null and void, a receipt in full of the premium charged, and the testimony of the company's agent that he delivered the policy, collected the premium, and remitted the same to the company, after deducting his commission, is sufficient to prove the payment of said premium.—*Wickert v. Farmers' Insurance Company*, 569.

IRRIGATION. Same as WATERS AND WATER RIGHTS.

JUDGMENT ROLL.

Papers not properly part of the judgment roll as defined by statute cannot be considered on appeal unless they have been made part of a bill of exceptions.—*Furrell v. Oregon Gold Company*, 464.

JUDGMENTS AND DECREES.

MOTION FOR JUDGMENT.

1. If the admissions of the reply so contradict the allegations of the complaint as to defeat the right of action the remedy must be by motion for a judgment on the pleadings.—*Wyatt v. Henderson*, 48.

VACATING JUDGMENT AFTER CLOSE OF TERM.

2. A judgment cannot be vacated after the close of the term during which it was rendered on the ground that the trial judge had died without settling the bill of exceptions, where the proposed bill was not served on the opposite party, and no general order was made continuing all unfinished business to the next term.—*Alexander v. Lang*, 222.

RELIEF FROM JUDGMENT TAKEN BY SURPRISE OR NEGLIGENCE.

3. A judgment entered in violation of an agreement extending the time to answer is one taken through defendant's "surprise or excusable neglect," within the meaning of section 102, Hill's Ann. Laws, authorizing the court, in its discretion, to relieve a party from such a judgment.—*Thompson v. Connell*, 231.

JURISDICTION OF EQUITY TO GRANT RELIEF AGAINST JUDGMENT.

4. A denial of an application under section 102 of Hill's Ann. Laws to vacate a judgment on the ground of inadvertence, surprise, or excusable neglect is a bar to a suit in equity for the same relief on the same ground.—*Thompson v. Connell*, 232.

DEFAULT JUDGMENT BY CLERK.

5. A judgment entered by the clerk where no answer is filed is valid, and such action is not an exercise of judicial power.—*Talbot v. Garretson*, 256.

DECREE MUST FOLLOW PLEADINGS.

6. A decree must always follow the issues made by the pleadings, and if it is based on irrelevant evidence or on extraneous issues it cannot be upheld.—*Goldsmith v. Elwert*, 539.

ENJOINING UNCONSCIONABLE JUDGMENT.

7. A court of equity has jurisdiction to restrain the enforcement of an unconscionable judgment procured through fraud, or unavoidable accident, or excusable mistake.—*Handley v. Jackson*, 562.

JUDGMENTS AND DECREES—CONCLUDED.

ENJOINING JUDGMENT—UNAUTHORIZED ATTORNEY.

8. The enforcement of an unconscionable judgment entered on an appearance by an unauthorized attorney will be restrained in equity.—*Handley v. Jackson*, 552.

RATIFICATION BY OFFER OF COMPROMISE.

9. A judgment rendered against a defendant under an unauthorized appearance by attorney is not ratified by a conditional but unaccepted offer to pay a certain sum in full satisfaction of the judgment.—*Handley v. Jackson*, 552.

RES JUDICATA—JUDGMENT.

10. A judgment is conclusive only on parties and privies, and after a party has had a day in court, from which it follows that where several persons are sued but only part of them are brought in, a judgment between the plaintiff and such defendants cannot bind the defendants who did not participate therein.—*Handley v. Jackson*, 552.

JURISDICTION

Of Equity—Mis-description in Deed—Mutual Mistake. See EQUITY, 1.

Of Equity not Lost by Change of Conditions. See EQUITY, 4.

To Vacate Judgment After Close of Term. See JUDGMENT, 2.

Of Equity to Set Aside Judgment Taken Through Surprise. See EQUITY, 5.

Of Federal Courts—Diverse Citizenship. See REMOVAL OF CAUSES, 2, 3, 4, 5.

Over Foreign Corporations—Must be in State. See CORPORATIONS, 6.

How Obtained Over Foreign Corporations. See CORPORATIONS, 7, 8, 9, 10.

Of Equity to Restrain Execution on Judgment Dependent on Appearance by Unauthorized Attorney. See EQUITY, 14.

JURY TRIAL. Same as TRIAL.

JUSTICE'S COURTS.

Amending Pleadings on Appeal From. See PLEADING, 2.

Garnishee is a "Party"—Right of Appeal. See PARTIES, 1.

LABOR CLAIMS

ASSIGNABILITY OF PREFERRED CLAIMS FOR LABORER'S WAGES.

1. The preferential claim for wages of laborers given by the act of February 20, 1891, (Laws, 1891, p. 82) is, after presentation, assignable, and, when assigned, the assignee may maintain suit thereon in his own name.—*Falconio v. Loren*, 187.

RAILROAD MORTGAGES—RECEIVERS—WAGES OF EMPLOYERS.

2. A railroad mortgagee is not liable for unpaid wages or other obligations incurred by a receiver appointed at the mortgagee's instance in a foreclosure suit, although the trust fund is insufficient to pay them, unless such responsibility was imposed by the court as a condition of the appointment, or the continuance of the receiver in office.—*Farmers' Loan Company v. Oregon Pacific Railroad Company*, 257.

POWER OF COUNCIL TO PROTECT LABORERS.

3. A provision in a city charter requiring the city council to take from every contractor for a public improvement a bond to pay the claims of laborers and material men, is not a limitation on the power of the council, but only a direction; therefore, the council may make such other and appropriate regulations on the subject as it may deem proper.—*Hamilton v. Gambell*, 320.

LANDLORD AND TENANT.

The relation of landlord and tenant arises where one, by consent of the landlord, goes into possession of leased land as the successor in interest of the tenant, and while thus occupying the land pays rent at the rate stipulated in the lease, and continues to so occupy the premises after the expiration of the term, all with the consent of the landlord.—*Weaver v. Southern Oregon Company*, 14.

LATIN MAXIMS.

Qui Facit per Alium Facit per se.—*State ex rel v. Lacey*, at p. 86.

LEGISLATIVE CONSTRUCTION

Of Statute is Strongly Persuasive. See STATUTES, 2, 6.

LIEN

On Insolvent Estate for Unpaid Dividends. See INSOLVENTS, 2.

On Insolvent Estate for Trust Funds. See INSOLVENTS, 2.

By Garnishment to Support Creditor's Suit. See CREDITOR'S SUIT, 6.

LINCOLN COUNTY.

Fees of County Officers. See STATUTORY CONSTRUCTION, 12.

LIMIT OF MUNICIPAL INDEBTEDNESS.

The indebtedness of a city is not increased by the issue of bonds in place of outstanding warrants against the city which are to be taken up by the bonds issued.—*Morris v. Taylor*, 62.

LOCAL AND SPECIAL LAWS. Same as CONSTITUTIONAL LAW.

MALICIOUS PROSECUTION.

WAIVER OF EXAMINATION AS EVIDENCE.

1. A finding by an examining magistrate that there is sufficient cause for holding an accused person to bail before the grand jury is only prima facie evidence that there was probable cause for the arrest, and on a subsequent trial for malicious prosecution this may be attacked by competent evidence that the prosecutor acted with malice.—*Hess v. Oregon Baking Company*, 503.

PLEADING.

2. In an action for malicious prosecution an allegation in the complaint that there was no probable cause for the arrest is sufficient to authorize the admission of evidence of want of probable cause, notwithstanding a waiver by plaintiff of the preliminary examination in the criminal proceedings.—*Hess v. Oregon Baking Company*, 503.

INSTRUCTION AS TO PROBABLE CAUSE.

3. In an action for malicious prosecution, if the facts are undisputed, the court must declare as a matter of law whether they constitute probable cause; but if the evidence is conflicting the case must go to the jury with instructions that if certain facts exist there was or was not probable cause.—*Hess v. Oregon Baking Company*, 503.

GOOD FAITH.

4. Any citizen who in good faith causes the arrest of one whom he has good reason to believe has violated the law will be protected in an action for malicious prosecution, although the criminal action prove unfounded.—*Hess v. Oregon Baking Company*, 504.

ADVICE OF PROSECUTING OFFICER.

5. One who in good faith seeks the advice of a prosecuting officer about the commencement of a criminal prosecution and discloses to him all the facts and circumstances within his knowledge or which he has reasonable ground to believe, relating to the offense, and is advised by such officer to institute the prosecution, has probable cause for so doing, if he acts in good faith upon such advice, even though there were other exculpatory facts which he might have ascertained by diligent inquiry.—*Hess v. Oregon Baking Company*, 504.

MANDAMUS.

ACTION AGAINST CITY ON WARRANT.

1. The holder of a city warrant, payment of which has been refused for lack of funds, is not restricted to proceedings by mandamus, but may sue the city thereon, notwithstanding section 362, Hill's Ann. Laws, providing that execution shall not issue on a judgment against a public corporation, but that on presentation of a certified transcript of the docket, and memorandum of the satisfaction thereof, the proper officer of the corporation shall draw an order on its treasurer for the amount of the judgment, which shall be presented and paid like other orders on the treasurer.—*Goldsmith v. Baker City*, 249.

TO COMPEL PERFORMANCE OF PUBLIC DUTY.

2. Mandamus will lie to compel the performance of the duty of auditing a claim for services to the state, where, as in the case of salaries of public officers,

MANDAMUS—CONCLUDED.

the nature and amount of the services rendered are definitely fixed and ascertained, and the compensation therefor is regulated by law, since in such case the duty is merely ministerial. — *Shattuck v. Kincaid*, 380.

MANDAMUS TO AUDIT CLAIMS.

3. Under Hill's Ann. Laws, § 2208, 3877, whereby the secretary of state is charged with the duty of determining claims against the state, mandamus will issue to compel such officer to pass upon an unliquidated demand for supplies furnished to the penitentiary, and to allow or disallow the same. — *Croswoman v. Kincaid*, 446.

SECRETARY OF STATE—EXAMINATION OF CLAIMS.

4. Under Hill's Ann. Laws, § 2848, providing that the secretary of state shall cause to be printed blank assessment rolls and other forms; and § 2208, subdivision 7, requiring him to examine the claim therefor, and to draw his warrant for it, if correct—mandamus will issue to compel him to act, but not to direct how or to what effect he shall act; since, in passing upon the quality of the work and materials, reasonableness of the charge, etc., he must exercise his discretion and judgment. — *Irwin v. Kincaid*, 478.

MANDATE

Of Supreme Court—Long Delay in Issuing—Costs. See COSTS, 6.

MARRIAGE.

A marriage contracted in another state by a resident of Oregon who has been divorced here by a decree from which there is yet time to take an appeal is absolutely void. — *McLennan v. McLennan*, 480.

MARRIED WOMEN. Same as HUSBAND AND WIFE.

MAXIMS. See LATIN MAXIMS.

MENTAL INCAPACITY.

Degree Necessary to Avoid Conveyance. See DEED, 2.

Not Inferred From Extreme Old Age. See INFERENCE, 2.

Example of Insufficient Allegations of. See PLEADING, 11.

MISTAKE.

Relief in Equity Against Mutual Mistake in Description. See EQUITY, 1.

Mere Mistake Will Not Justify a Rescission of Contract. See CONTRACT, 6.

MORTGAGORS. See also CHATTEL MORTGAGES.

HOMESTEADER MAY MORTGAGE.

1. A homestead claimant on public land may encumber his homestead if he chooses; the limitation of section 2296, Revised Statutes United States, applies only to involuntary appropriations of the land. — *Howard v. Reckling*, 161.

RESTORING MORTGAGE LIEN—EQUITY.

2. Before a court of equity can restore the lien of a mortgage canceled by mistake it must appear that at the time of such release the mortgagee did not know of the intervening lien over which he desires to obtain priority. — *Tulbot v. Garretson*, 256.

FRAUD—CONDUCT OF PARTIES.

3. A genuine mortgage may become void by such subsequent conduct of the parties as enables the mortgagor to hinder and delay creditors in reaching property that is lawfully subject to their demands. — *Sabin v. Williams*, 450.

AUTHORITY OF MANAGER TO MORTGAGE.

4. A general manager of a corporation located at the mill, and inaccessible to the officers, has power to mortgage the commercial property of the corporation to pay running expenses. — *Thayer v. Nehalem Mill Company*, 437.

MOTION

For Judgment on Inconsistent Pleadings. See PLEADING, 2.

To Remove to Federal Court—Effect of Denying. See REMOVAL OF CAUSES, 1.

MUNICIPAL CORPORATIONS. See also COUNTRIES.

LIMIT OF INDEBTEDNESS.

1. The indebtedness of a city is not increased by the issue of bonds in place of outstanding warrants against the city which are to be taken up by the bonds issued.—*Morris v. Taylor*, 62.

POWER OF MUNICIPALITY TO ISSUE BONDS.

2. A city which has express power to borrow money for municipal purposes and issue and dispose of negotiable or other municipal bonds may issue bonds in lieu of and for the purpose of funding its floating indebtedness.—*Morris v. Taylor*, 62.

IMPLIED POWER OF AGENT.

3. Delegation of authority to an agent implies the power to do all things necessary, proper, usual, and reasonable in order to effectuate the purpose of the agency, and this rule is applicable to the agents and officers of municipal corporations as well as to the agents of private individuals.—*Flagg v. Marion County*, 15.

CHARACTER OF MUNICIPAL WARRANTS.

4. Ordinary city, county, or state warrants are only *prima facie* evidence of indebtedness, and do not constitute a final adjudication of the claims which they represent.—*Goldsmith v. Baker City*, 249; *Frankl v. Batley*, 285; *Shattuck v. Kincaid*, 373.

ACTION AGAINST CITY ON WARRANT—MANDAMUS.

5. The holder of an unpaid city warrant is not restricted to his remedy by mandamus, but may maintain an action at law and reduce his claim to judgment, although, under section 352, Hill's Ann. Laws, no execution can be issued thereon.—*Goldsmith v. Baker City*, 249.

CONTRACTS FOR PUBLIC IMPROVEMENTS—GARNISHMENT.

6. Portland City Charter, § 118, providing for the taking of bonds for the faithful performance of a contract for improvements, and also to secure material men and others their claims under such contract, is not violated by an ordinance which provides that where public improvements have been accepted by the proper authorities a material man may file his claim with the city auditor within five days thereafter, and directs that the auditor shall withhold the amount due the contractor till the amount of the claim is adjusted, and that on the failure of the contractor and the claimant to agree, and on the claimant's commencing within twenty days an action to recover the claim, and causing a writ of attachment to be issued and notice thereof to be served on the auditor, the auditor shall withhold the warrant from the contractor till a final determination of the rights of the parties. The section in the charter requiring a bond with certain conditions is not a limitation on the manner in which contracts may be drawn, but is a proviso that no contract shall be made without that kind of bond. The regulation of the ordinance is a reasonable one, intended to comply with the moral duty resting alike on public corporations and private persons to see that those who perform services for them, either directly or indirectly, are paid, and it does not subject the city to garnishment.—*Hamilton v. Gambell*, 328.

POWER OF COUNCIL TO PROTECT LABORERS.

7. The requirement in a municipal charter by way of restriction upon the power of the common council to provide for the manner of doing the work of any proposed improvement that it shall provide for the taking of a bond to secure laborers, material men, and subcontractors is not exclusive of the power of the council to make additional provisions for the security of that class of persons.—*Hamilton v. Gambell*, 320.

IMPLIED POWER OF COUNCIL.

8. The power to contract conferred upon a municipal corporation, unless limited or restricted to certain conditions or a particular mode or method, necessarily implies the power to impose any reasonable regulations not contrary to law or public policy which may seem most conducive to the successful accomplishment of the purposes in hand.—*Hamilton v. Gambell*, 328.

CITY TREASURER—PARTIAL PAYMENTS ON WARRANTS.

9. Under charter provisions requiring the city treasurer to receive and safely keep all moneys of the city coming into his hands, and pay the same out on warrants and orders signed by the mayor and recorder, it is not his duty, and he therefore cannot be compelled, to make a partial payment on a warrant, though he is directed to do so by the city council.—*State ex rel. v. Grant*, 370.

DUTY OF TREASURER IN PAYING WARRANTS.

10. A warrant not being conclusive evidence of an indebtedness, it is the duty of a public treasurer to refuse payment unless it represents a legal claim.—*Goldsmith v. Baker City*, at page 232; *Shattuck v. Kincaid*, 372.

MUNICIPAL CORPORATIONS—CONCLUDED.

IMPLIED POWER OF TAXATION.

11. The charter of the City of Portland (Laws 1893, p. 619) § 36, empowers it to levy taxes for general municipal purposes not to exceed 8 mills on the dollar. Section 204 provides that during any fiscal year the rates of general and special taxes levied must not exceed, in the aggregate, 1½ per cent. *Held*, that section 204 does not authorize a special tax in addition to the 8 mills authorized by section 36, and it is immaterial that under such construction the city cannot meet its current expenses and pay interest.—*Corbett v. City of Portland*, 407.

12. Nor is such special tax authorized because the prior charter, creating the municipality, imposed on it a part of such indebtedness, and authorized the creation of the remainder, and no express provision was made for its payment.—*Corbett v. City of Portland*, 407.

LIMIT OF TAXATION UNDER PORTLAND CHARTER OF 1893.

13. Under sections 36 and 204 of the Portland charter of 1893 the municipality cannot levy a tax of more than eight mills on the dollar, section 204 being a limitation and not a grant of power.—*Corbett v. City of Portland*, 407.

RIGHT OF MUNICIPALITIES TO TAX.

14. The right of taxation is essentially a sovereign attribute and can be exercised by municipalities only in the manner and to the extent conferred upon them by their charters, and taxation by such bodies must always be supported by an express or necessarily implied grant of power.—*Corbett v. City of Portland*, 407.

POWER OF COURTS TO COMPEL MUNICIPAL TAXATION.

15. The courts cannot compel municipal corporations to levy taxes in excess of the limit of taxation imposed by their charters even at the suit of a creditor whose debt will otherwise remain unpaid, unless the charter limitation is such an abridgement of the right of taxation existing at the time the debt was incurred as in effect to impair the obligation of the contract.—*Corbett v. City of Portland*, 407.

MUTUAL MISTAKE.

Mis-description in Deed—Relief in Equity. See EQUITY, 1.

NEGLECT.

Excusable Neglect—Relief Against Judgment. See JUDGMENTS, 3.

NEGLIGENCE.

CONTRIBUTORY NEGLIGENCE A BAR TO RECOVERY OF DAMAGES.

1. A person who, by a slight effort and without danger to himself, could have avoided the destruction of his property, but did not do so, is chargeable with such contributory negligence as will prevent his recovery from the person who caused the injury.—*Richmond v. McNeill*, 342.

RAILROAD FIRE FROM ENGINE—NONSUIT.

2. A plaintiff in an action against a railroad company for damages to land caused by fire which spread from combustible material negligently left along the company's right of way and ignited by a passing locomotive, cannot be charged with such negligence as will support a nonsuit, when his servant who was in charge of the property went with reasonable diligence to the scene of the fire, and made some effort to perform his duty, the degree of which is a question of fact for the jury.—*Richmond v. McNeill*, 342.

NONSUIT.

The evidence of contributory negligence in this case is not so clear as to justify the court in ordering a nonsuit, since there is evidence that plaintiff's servants made some attempt to put out the fire before it had assumed dangerous proportions.—*Richmond v. McNeill*, 342.

NOTES. Same as BILLS AND NOTES.

NOTICE

Of Intention to Establish Highway on Toll Road. See HIGHWAYS, 2.

Of Discharge of Receiver not Necessary. See RECEIVERS, 2.

OFFICERS.

LIABILITY ON GENERAL AND SPECIAL BONDS.

1. Where duties are imposed on a public officer beyond those naturally incident to his office, and he is required to give a bond to insure their faithful performance, the sureties on his general bond are not liable for any delinquency in the performance of the new duties.—*Columbia County v. Massie*, 292.

LIABILITY ON TAX COLLECTOR'S BOND.

2. Under the laws of Oregon in force in the year 1895, the general bonds of sheriffs and the special bonds required of them as tax collectors were not cumulative, but were independent bonds intended to secure the faithful performance of separate and distinct duties; from which it follows that the sureties on one of such bonds were not liable for any defalcation in the performance of the duties for which the other bond was given.—*Columbia County v. Massie*, 292.

APPROPRIATION FOR PAYMENT OF STATE OFFICERS.

3. A statute fixing the amount of the salary of a public official and prescribing the time and manner of payment does not constitute a continuing appropriation for the discharge of such obligation, under a constitutional provision that "no money shall be drawn from the treasury but in pursuance of appropriations made by law," in view of contemporaneous legislative construction of the statute to that effect.—*Shattuck v. Kincaid*, 379.

DUTY OF SECRETARY OF STATE TO AUDIT CLAIMS.

4. When a claim against the state is presented to the secretary he must pass upon it by either rejection or approval without regard to whether the legislature has or has not appropriated money to meet it, and, if he allow the claim, he must indorse upon it the amount so allowed, and the name of the particular original fund from which it is to be paid, and draw his warrant on the state treasury therefor.—*Shattuck v. Kincaid*, 379.

EFFECT OF DRAWING WARRANTS—AUDITING CLAIMS.

5. The drawing of a warrant on the state treasury is, under the present statutes, a part of the act of auditing, and is not a drawing of money from such treasury.—*Shattuck v. Kincaid*, 379.

REFUSAL OF TREASURER TO PAY WARRANT.

6. Since a warrant is not conclusive evidence of an indebtedness it is the duty of the state treasurer to refuse payment unless it represents a claim authorized by law.—*Goldsmith v. Baker City*, at p. 232; *Shattuck v. Kincaid*, 379.

MANDAMUS TO PUBLIC OFFICER.

7. Mandamus will lie to compel the performance of the duty of auditing a claim for services to the state, where, as in the case of salaries of public officers, the nature and amount of the services rendered are definitely fixed and ascertained, and the compensation therefor is regulated by law, since in such case the duty is merely ministerial.—*Shattuck v. Kincaid*, 380.

8. An officer may be compelled by mandamus to exercise a discretion vested in him, notwithstanding that the court has no power to determine how he shall exercise it or to control his judgment.—*Croasman v. Kincaid*, 445.

MANDAMUS TO AUDIT CLAIMS.

9. Under Hill's Ann. Laws, § 2206, 3877, whereby the secretary of state is charged with the duty of determining claims against the state, mandamus will issue to compel such officer to pass upon an unliquidated demand for supplies furnished to the penitentiary, and to allow or disallow the same.—*Croasman v. Kincaid*, 445.

MANDAMUS—SECRETARY OF STATE—EXAMINATION OF CLAIMS.

10. Under Hill's Ann. Laws, § 2848, providing that the secretary of state shall cause to be printed blank assessment rolls and other forms; and § 2506, subdivision 7, requiring him to examine the claim therefor, and to draw his warrant for it, if correct,—mandamus will issue to compel him to act, but not to direct how or to what effect he shall act; since, in passing on the quality of the work and materials, reasonableness of the charge, etc., he must exercise his discretion and judgment.—*Irvine v. Kincaid*, 478.

OFFICIAL FEES. Same as SHERIFFS.

OFFICIAL BOND.

Liability on General and Special Bonds. See OFFICERS, 1, 2.

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Evidence to Supplement Records of County Court When Acting as Fiscal Agent of County. See EVIDENCE, 4.

Agreement Between Cosureties Concerning Their Relative Liability Need not be in Writing. See STATUTE OF FRAUDS.

PARTIES.

GARNISHEE IS A "PARTY" TO AN ACTION.

A garnishee against whom a judgment has been rendered in a justice's court is a "party" to the case in which the garnishment notice issued, in the sense that he can appeal. — *Burns v. Payne*, 100.

PARTNERSHIP.

EFFECT OF DISSOLUTION OF PARTNERSHIP.

1. The dissolution of a partnership by the mutual consent of all its members does not destroy the firm's identity, which, in contemplation of law, continues until its debts are paid and its affairs wound up.—*Riggen v. Investment Company*, 85.

POWERS OF PARTNERS AFTER DISSOLUTION.

2. Each partner, after the voluntary dissolution of the firm, has the same power to collect debts due the firm, unless he has assigned his interests therein, that is possessed by a partner in the ordinary course of the partnership business.—*Riggen v. Investment Company*, 85.

DISSOLUTION—ASSIGNMENT OF INTEREST BY RETIRING PARTNER.

3. A dissolution agreement contained an assignment by the retiring partner to the other of all his interest in the business, and provided that each partner was to pay one half the firm debts, and that the continuing partner should collect money due, and pay the retiring member one half thereof. *Held*, not an assignment by the retiring partner of his interest in commissions earned by the firm before dissolution.—*Riggen v. Investment Company*, 85.

USE OF FIRM NAME BY RETIRING PARTNER—ESTOPPEL.

4. A retiring partner who agreed that the other member of the firm should have the sole right to settle the partnership business and use the firm name was not thereby estopped from suing in the firm name to recover a firm debt; for no interest in the partnership property was thereby transferred, but only an agency, and the power that created that relation was equally competent to destroy it.—*Riggen v. Investment Company*, 85.

RIGHTS OF FIRM CREDITORS TO PARTNERSHIP PROPERTY.

5. Simple contract creditors of a partnership have not such a lien upon the assets of the firm as will enable them to follow and subject such assets, or the proceeds thereof, to the payment of the firm debts after all partners have parted with their interest therein.—*Stahl v. Osmers*, 199.

6. Partnership creditors do not by virtue of their relation to the firm have a lien on the firm property. Each partner has a lien on or equity in such property, and the firm creditors may by appropriate proceedings avail themselves of that equity through him but not otherwise; the extinguishment of the equity of the partners extinguishes that of their creditors.—*Stahl v. Osmers*, 199.

PART PAYMENT.

Effect of Accepting Part of a Claim. See PAYMENT, 1.

Of City Warrant Cannot be Compelled. See MUNICIPAL CORPORATIONS, 3.

PAYMENT.

PART PAYMENT OF CLAIM AGAINST COUNTY.

1. The mere acceptance of a portion of a claim presented to a county is insufficient to create a presumption that the payment was either made or accepted in full of the claim, within the rule that if a claim presented to a county is allowed in part and rejected as to the residue, and the claimant, knowing of such action, accepts the amount allowed, such acceptance will be considered a satisfaction of the whole.—*Flagg v. Marion County*, 18.

AUTHORITY OF ATTORNEY.

2. Under the general power to represent his client an attorney cannot accept anything but money in satisfaction of a judgment.—*Barr v. Rader*, 225.

PARTIAL PAYMENT ON WARRANTS BY CITY TREASURER.

3. Under charter provisions requiring the city treasurer to receive and safely keep all moneys of the city coming into his hands, and pay the same out on warrants and orders signed by the mayor and recorder, it is not his duty, and he therefore cannot be compelled, to make a partial payment on a warrant, though he is directed to do so by the city council.—*State ex rel. v. Grant*, 570.

PLEADING.

ANTICIPATING DEFENSE.

1. In pleading under the code system it is not necessary or appropriate to anticipate a possible defense; thus, in a suit against a county to enjoin an alleged unlawful appropriation of plaintiff's toll road, the complaint need not aver defendant's failure to pay plaintiff the amount prescribed by statute as a condition precedent to the appropriation. Such payment is a matter of defense.—*Little Neckucca Road Company v. Tillamook County*, 2.

PLEADING—CONTINUED.

AMENDING PLEADINGS ON APPEAL FROM JUSTICE'S COURTS.

2. The law of 1893, amending chapter 9, § 80, of the Justice's Code (Laws 1893, p. 88), does not limit the right of amendment on appeal to the circuit court to cases where the pleadings were oral, nor to such amendment as will not change the issues. On the contrary, after taking an appeal, a new answer may be filed setting forth an entirely new defense, if substantial justice will thereby be promoted.—*Meyer v. Edwards*, 23.

MOTION FOR JUDGMENT—CONTRADICTORY PLEADINGS.

3. The allegations and admissions in a reply cannot operate to render a complaint which is sufficient on its face obnoxious to an objection that it fails to constitute a cause of action, but if the admissions of the reply so contradict the allegations of the complaint as to defeat the right of action, the remedy must be by motion for a judgment on the pleadings.—*Wyatt v. Henderson*, 48.

AMENDING AFFIDAVIT OF CONTEMPT—VERIFICATION.

4. An affidavit being necessary as the basis of proceedings for contempt for acts not committed in the presence of the court (Hill's Ann. Laws, § 653), an amendment of such affidavit must be accompanied by a verification thereof.—*State ex rel. v. Lavery*, 77.

LAW ACTION BASED ON RESCISSION—PLEADING TENDER.

5. In a law action based on a rescission of a fraudulent contract on which something has been paid the complaint must contain an allegation that the consideration received has been repaid, or that plaintiff is willing to repay.—*Crosen v. Murphy*, 114.

AMENDMENT BY PLEADING NEW CAUSE OF ACTION.

6. It is within the power of the court, under section 101, Hill's Ann. Laws, to allow a party to file before trial an amended pleading containing a new cause of action or defense material to the subject matter of the controversy then before the court; although the original cause cannot be abandoned, and an entirely different one substituted.—*Tulbot v. Garrettson*, 256.

AMENDMENT BY OMITTING A PARTY.

7. The rule in Oregon concerning amendments to complaints by omitting some parties originally sued is that when it appears, in an action upon a joint contract, that one or more of the defendants are not liable, they may be dropped and the cause continued as to the others, the test being whether there could have been a recovery against any of the defendants had they been sued alone.—*Tillamook Dairy Association v. Schermerhorn*, 308.

9. It is an appropriate exercise of discretion for a trial court to permit a complaint to be amended before trial by omitting the name of a defendant.—*Tillamook Dairy Association v. Schermerhorn*, 308.

AMENDMENT AFTER MOTION FOR NONSUIT.

10. Permitting an amendment of a complaint by alleging an insurable interest in plaintiff's assignor at the time of a loss is not affecting any substantial right of the plaintiff in an action on a fire insurance policy, but is clearly a wise exercise of judicial discretion in the matter of amendments. Under section 101, Hill's Ann. Laws, such an amendment may properly be made after a motion for a nonsuit.—*Koshland v. Fire Association*, 368.

PLEADING MENTAL INCAPACITY.

11. In a suit brought by heirs to set aside a conveyance of real property made by decedent the day before his death, an allegation in the complaint of decedent's mental incapacity to convey "prior to the time of his death" and "immediately before such time" is not a sufficient averment to show his incapacity at the time the deed was executed.—*Carnegie v. Diven*, 366.

MALICIOUS PROSECUTION—LACK OF PROBABLE CAUSE.

12. In an action for malicious prosecution an allegation in the complaint that there was no probable cause for the arrest is sufficient to authorize the admission of evidence of want of probable cause, notwithstanding a waiver by plaintiff of the preliminary examination in the criminal proceedings.—*Bess v. Oregon Baking Company*, 503.

CONSTRUCTION OF PLEADINGS.

13. In view of section 84, Hill's Ann. Laws, providing that the allegations of a pleading "shall be liberally construed, with a view of substantial justice between the parties," the inadvertent omission of the word "not" in a complaint will be cured by a decree for plaintiff.—*Wyatt v. Wyatt*, 531.

PLEADING — CONCLUDED.

CREDITOR'S BILL — SUFFICIENCY OF COMPLAINT.

14. A creditor's bill that alleges the issuance of an execution and its return nulla bona is sufficient without an averment that the debtor has no property out of which the judgment can be satisfied. — *Wyatt v. Wyatt*, 581.

PRACTICE IN CIVIL CASES

- Amending Pleadings on Appeal From Justices Court. See PLEADING, 2.
- Inconsistent Pleadings — Motion for Judgment. See PLEADING, 3.
- Estoppel to Change Position During Litigation. See ESTOPPEL, 2.
- Verification of Amended Charge of Contempt. See PLEADING, 4.
- Consideration of Assignee's Final Report. See ASSIGNMENT FOR CREDITORS, 1.
- Objections Must be Made Before Trial Court. See APPEAL, 4.
- Effect of Denying Motion to Remove. See REMOVAL OF CAUSES, 1.
- Amendment of Complaint by Adding New Cause of Action. See PLEADING, 6.
- Amending Complaint by Dropping a Party Defendant. See PLEADING, 7, 8.

PRACTICE IN PROBATE CASES

- Allowing Extra Compensation to Executors. See EXECUTORS, 7, 8.
- Allowance of Attorney's Fees Against Estate. See EXECUTORS, 4, 5.
- Removing Administrator — Notice Required. See EXECUTORS, 9.

PRACTICE IN SUPREME COURT.

- Defense not Presented — Negligence — Reversal. See COURTS, 5.
- Issuing Mandate Without Paying Costs not Approved. See COURTS, 6.
- Trial Anew in Equity Cases on the Evidence. See COURTS, 7.

PREFERRED CLAIM FOR WAGES is Assignable. See CHOSES IN ACTION, 2.

PRELIMINARY EXAMINATION.

- Waiving is not Admitting Offense Charged. See CRIMINAL LAW, 1.

PRESUMPTION.

ARISING FROM ACCEPTING PART PAYMENT.

1. The mere payment and acceptance of part of a debt does not justify a presumption that such payment was made or taken in full settlement. — *Flagg v. Marion County*, 18.

PRESUMPTION OF REASONABLENESS OF PUBLIC CONTRACT.

2. A contract entered into by a county clerk under the power conferred upon him by section 47 of the "Australian Ballot Law" (Laws 1891, p. 28) to cause official ballots to be printed must, in the absence of an affirmative showing to the contrary, be regarded as reasonable and valid. — *Flagg v. Marion County*, 18.

THAT DECREE FOLLOWED COMPLAINT.

3. It will be presumed that a decree followed the allegations and prayer of the complaint on which it was based, when the records are lost. — *State ex rel. v. Lavery*, 77.

THAT REGULAR MORTGAGE IS VALID.

4. The presumption always is that an instrument regular and apparently fair on its face is valid, a party asserting the contrary has the burden of proof. — *Sabin v. Watkins*, 460.

FROM FAILURE TO APPEAL.

5. A party who does not appeal is considered as accepting the situation; if dissatisfied, an appeal must be taken, either direct or cross. — *Goldsmith v. Elwert*, 539.

PRINCIPAL AND AGENT. Same as AGENTS.

PROBABLE CAUSE.

- Pleading Want of Probable Cause for Arrest. See MALICIOUS PROSECUTION, 2.
- Instructions by Trial Court — Conflicting Evidence. See MAL. PROS., 3.
- Arrest on Advice of Prosecuting Officer. See MALICIOUS PROSECUTION, 5.

PROCESS. Same as **SUMMONS**.

PROMISSORY NOTES. Same as **BILLS AND NOTES**.

PROVINCE OF JURY.

Disputed Facts Should be Settled by Jury. See **TRIAL**, 1.

PUBLIC HIGHWAYS. Same as **HIGHWAYS**.

PUBLIC LANDS.

The homestead act (Rev. St. U. S. § 2296), providing that no lands acquired thereunder "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," merely prevents the unwilling appropriation of the land to the satisfaction of such debts, and does not prevent the homestead claimant, after issuance of the final certificate, and before patent, from giving a mortgage on the land for a debt then contracted or theretofore existing.—*Howard v. Reckling*, 161.

PUBLIC OFFICIALS.

Liability on Bonds of Public Officials. See **OFFICERS**, 1.

Liability on Bonds of Tax Collector. See **OFFICERS**, 2.

Continuing Appropriation for Salaries. See **OFFICERS**, 3.

Secretary of State Must Audit Claims Presented. See **OFFICERS**, 4, 7.

Treasurer Should Refuse to Pay Illegal Warrant. See **OFFICERS**, 6.

PUBLIC ROADS. Same as **HIGHWAYS**.

PUBLIC USE. Same as **EMINENT DOMAIN**.

QUESTION FOR JURY.

Disputed Deductions From Evidence. See **TRIAL**, 1.

RAILROADS.

FENCES—INJURY TO STOCK.

1. If stock enter upon a railway at a point where the statute requires the road to be fenced, and are injured by a moving train, the company will be liable in damages, regardless of whether it was negligent; but if stock enter on the right of way at a place where the company is not bound to fence, and are injured, negligence must be shown to justify a recovery.—*Eaton v. McNeill*, 128.

RAILROAD MORTGAGES—RECEIVERS—WAGES OF EMPLOYEES.

2. A railroad mortgagee is not liable for unpaid wages or other obligations incurred by a receiver appointed at the mortgagee's instance in a foreclosure suit, although the trust fund is insufficient to pay them, unless such responsibility was imposed by the court as a condition of the appointment, or the continuance of the receiver in office.—*Farmer's Loan Company v. Oregon Pacific Railroad Company*, 287.

INFERENCE OF NEGLIGENCE.

3. Evidence tending to show that a railway company negligently left along its track combustible material, which was discovered to be on fire soon after the passing of a train, and plaintiff thereby suffered damage, raises an inference that the fire was caused by sparks from the engine, which the company must rebut.—*Richmond v. McNeill*, 342.

RATIFICATION.

Knowledge of Agent's Acts Necessary. See **AGENTS**, 4.

Of Judgment by Offer of Compromise. See **JUDGMENTS**, 9.

REAL PARTIES In Interest.

Assignee of Chose in Action is Real Party Interested. See **CHOSE IN ACTION**.

RECEIVERS.

WAGES DUE EMPLOYEES OF RECEIVER.

1. The wages of the employees of a receiver are not a claim against the person who instigated the receivership unless there was an order of court making such responsibility a condition of the creation or continuance of the receivership.—*Farmer's Loan Company v. Oregon Pacific Railroad Company*, 287.

RECEIVERS—CONCLUDED.

NOTICE OF DISCHARGE.

2. A receiver who has been appointed *pendente lite*, in a suit to wind up the affairs of an insolvent corporation, may be discharged without notice to the creditors generally; and, too, the suit itself may be so dismissed on motion of the complaining party.—*Rockwell v. Portland Savings Bank*, 431.

RELIEF FROM JUDGMENT ON Ground of Surprise.

Refusal to Set Aside Bars Equity Suit on Same Ground. See JUDGMENTS, 4.

REMEDY AT LAW. See EQUITY, 9, 10.

REMOVAL OF ADMINISTRATOR.

Notice of Objections—Entitled to Hearing. See EXECUTORS, 2.

REMOVAL OF CAUSES.

PRACTICE—EFFECT OF DENYING MOTION.

1. Where a petition and bond for the removal of a cause are presented to a state court the only question to be there determined is whether the record shows a *prima facie* right to remove; all questions of fact must be determined by the federal courts. If the application for removal is denied, the petitioner loses no rights by contesting the case on its merits, and the point is still good on appeal.—*Koshland v. National Insurance Company*, 206.

JURISDICTION OF UNITED STATES COURTS—DIVERSE CITIZENSHIP.

2. Under the provisions of section 1 of the Removal Act of March 3, 1887 (24 U. S. Stat. 562), as amended and corrected August 13, 1888 (25 U. S. Stat. 433), the circuit courts of the United States are given original jurisdiction of civil suits between citizens of different states when the amount in controversy exceeds a certain sum, regardless of whether either party resides in the district where the suit is commenced, but if this jurisdiction arises solely from diverse citizenship, the proceeding can be commenced only in the district where either the plaintiff or defendant resides—in other words, the jurisdiction does not depend on the place of trial, but on the residence of the parties.—*Koshland v. National Insurance Company*, 206.

3. The provision in the Removal Act of 1887, as amended in 1888, that where the jurisdiction of the federal courts is dependent entirely on the diverse citizenship of the parties, the cause can be brought only in the district where either plaintiff or defendant resides, confers a personal privilege on the defendant, which he may waive by submitting to the jurisdiction of a federal court of a district where neither party resides. Such a case is always removable to the United States courts at the option of the defendant.—*Koshland v. National Insurance Company*, 206.

4. An action brought in a state court of Oregon by a resident of California, against a defendant residing in Connecticut, to recover a sum exceeding \$2,000, may be removed by the defendant to the federal court for the District of Oregon, since such a suit is one of which the courts of the United States are given jurisdiction by the first section of the Removal Act of 1887, as amended in 1888.—*Koshland v. National Insurance Company*, 206.

SUFFICIENCY OF PETITION—CITIZENSHIP OF FOREIGN CORPORATIONS.

5. A petition for the removal of a case from a state to a federal court is sufficient on the subject of citizenship when it shows that the petitioner is a corporation organized and existing under the laws of another state and having its principal office in such other state.—*Koshland v. National Insurance Company*, 206.

RESIDENCE OF FOREIGN CORPORATIONS.

6. A company incorporated in one state only, and doing business in another state in compliance with conditions imposed upon foreign corporations as prerequisites to their doing business therein, is neither a citizen nor a resident of the latter state, within the meaning of the act of March 3, 1887 (24 United States Statutes, 562), § 2, as amended and corrected by act of August 13, 1888 (25 United States Statutes, 433), providing for the removal of causes on the ground of nonresidence.—*Koshland v. National Insurance Company*, 206.

REPEAL BY IMPLICATION. See STATUTES.

RECISSION

Of Contract for Fraud—Tender of Consideration. See CONTRACTS, 3, 4, 5.

Intentional Misrepresentation Must be Shown. See CONTRACTS, 6.

Mere Mistakes Will not Justify Rescission. See CONTRACTS, 7.

RESIDENT Under REMOVAL ACTS. See WORDS AND PHRASES.

RES JUDICATA.

A judgment is conclusive only on parties and privies, and after a party has had a day in court, from which it follows that where several persons are sued but only part of them are brought in, a judgment between the plaintiff and such defendants cannot bind the defendants who did not participate therein.—*Handley v. Jackson*, 552.

REVISED STATUTES OF THE UNITED STATES Cited in this Volume.

Section 2298, *Howard v. Reckling*, 161.

24 U. S. Statutes, 552

25 U. S. Statutes, 438

Removal Act, 1887

Removal Act, 1888

} *Koshland v. National Insurance Company*, 208.

ROADS.

Locating Highway on Toll Road—Compensation. See HIGHWAYS, 1, 2.

Notice of Locating County Road on Toll Road. See HIGHWAYS, 2.

SALES.

EVIDENCE OF SALE.

1. An alleged division of property held in the name of a husband, made between him and his wife, because she had helped earn it and acquired an interest therein, testified to by the wife, when there is neither written evidence of such transfer nor change of possession, is not sufficient proof of a sale to her, when her testimony is contradicted by the husband.—*Perkins v. McCullough*, 69.

RESCISSION OF FRAUDULENT SALE.

2. Plaintiff was in the retail business with a partner, in whose name the lease of the building was made out. The partner, by collusion with members of a mercantile company, sold them his interest and transferred to them the lease. They thereupon gave plaintiff four days' notice to vacate the premises, and offered to buy his interest in the business, giving in part payment certain notes, representing them as first class paper, and also offered to employ him as clerk until the balance of the purchase price should be paid. Plaintiff accepted, and the contract was executed, but he was almost immediately discharged, and the notes proved to be worthless. *Held*, that the circumstances justified a rescission of contract for fraud.—*Crosen v. Murphy*, 114.

SEAL.

It is now settled that a corporate contract does not require a seal unless a similar contract, if made by an individual, would have to be sealed, and in such cases any convenient seal will accomplish the purpose.—*Thayer v. Nehalem Mill Company*, 487.

SECRETARY OF STATE.

Duty to Pass on Claims Presented. See OFFICERS, 4.

Auditing Includes Drawing a Warrant. See OFFICERS, 4.

May be Compelled to Audit Claims Presented. See OFFICERS, 7, 9, 10.

Must Draw Warrant Unless Claim is Rejected. See OFFICERS, 5.

SERVICE

Of Summons on Foreign Corporation. See SUMMONS, 1.

On President of Foreign Corporation. See SUMMONS, 2, 3.

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Laws, 1864, p. 745.—*Continental Insurance Company v. Biggen*, 335.

Laws, 1870, p. 579.

Laws, 1872, p. 125.

} —*Strickland v. Gelde*, 373.

Laws, 1885, p. 374.

—*State ex rel. v. Grant*, 372.

Laws, 1887, p. 118.

Laws, 1889, p. 64.

} —*Continental Insurance Company v. Biggen*, 335.

Laws, 1889, p. 92.

—*Fowler v. Fowler*, 65.

SESSION LAWS—CONCLUDED.

Laws, 1891, pp. 14-23. — *Flagg v. Marion County*, 19.

Laws, 1891, p. 82. — *Fulconio v. Larsen*, 137.

Laws, 1893, p. 38. — *Mayer v. Edwards*, 23.

Laws, 1898, pp. 66, 168, 182. — *Landis v. Lincoln County*, 424.

SETTLED ACCOUNTS.

Burden of Proof on Attempting to Surcharge. See EVIDENCE, 2.

SHEEP—Trespass by, in Gilliam County. See TRESPASS, 2.

SHERIFFS.

LIABILITY OF SURETIES ON GENERAL AND SPECIAL BONDS.

1. The sureties on a sheriff's general bond given under section 2392, Hill's Ann. Laws, are not liable for a defalcation of their principal as tax collector, since a special bond was given securing the faithful performance of that duty. — *Columbia County v. Massie*, 292.

FEES OF SHERIFF OF LINCOLN COUNTY.

2. The Act of 1898, fixing the fees of sheriff's applies to Lincoln County, as well as to other counties, and means that the sheriff of that county shall be paid for a given service just what the sheriff of Benton County was entitled to receive for a similar service under the old fee bill. — *Landis v. Lincoln County*, 424.

SPECIAL LAWS On the Subject of Taxes. See CONSTITUTIONAL LAW, 2.

STATE.

APPROPRIATION FOR SALARIES OF STATE OFFICERS.

1. Hill's Ann. Laws, § 2297, providing that each of the judges of the circuit courts shall receive a stated annual salary, payable quarterly; and section 2230, providing that the salaries of the officers of the state "shall be paid quarterly out of the treasury of this state, upon the warrant of the secretary of state, commencing from and after they enter upon the duties of their respective offices,"—did not effectuate a continuing appropriation for the payment of the salaries. — *Shattuck v. Kincaid*, 379.

AUDITING ACCOUNTS—DUTY OF SECRETARY.

2. The duty enjoined upon the secretary of state by Hill's Ann. Laws, § 2208, to examine and determine claims against the state where provision for the payment thereof shall have been made by law, to indorse upon the same the amount due and allowed therefor, and from what fund the same is to be paid, and to draw a warrant on the treasury for the same, is not dependent upon an appropriation for the payment of the claim or the class of claims to which it belongs, as the word "fund" therein does not refer to a subdivided or appropriated fund but to the original funds subsisting under the law. — *Shattuck v. Kincaid*, 379; *Croasman v. Kincaid*, 445; *Irwin v. Kincaid*, 478.

EFFECT OF DRAWING WARRANTS—AUDITING CLAIMS.

3. The drawing of a warrant on the state treasurer is, under the present statutes, a part of the act of auditing, and is not a drawing of money from such treasury. — *Shattuck v. Kincaid*, 379.

WARRANT AS EVIDENCE OF CLAIM.

4. A warrant is only prima facie evidence of the validity of a claim against a municipality or commonwealth. — *Shattuck v. Kincaid*, 379.

APPROPRIATION FOR PUBLIC INSTITUTIONS.

5. Section 3877, Hill's Ann. Laws, providing how the expenses of the penitentiary are to be paid and the claims audited does not make appropriation for the payment of such expenses. — *Croasman v. Kincaid*, 445.

STATE CONSTITUTION.

Article IV, section 23, *Landis v. Lincoln County*, 424.

Article VI, section 2, *Shattuck v. Kincaid*, 383.

Article IX, section 8, *Northup v. Hoyt*, 528.

Article IX, section 4, *Shattuck v. Kincaid*, 383.

21 Or.—44.

STATE COURTS.

Acquiring Jurisdiction over Foreign Corporations. See CORPORATIONS.

Cannot Determine Facts on Removal Petition. See REMOVAL OF CAUSES, 1.

STATE OFFICERS.

Continuing Appropriation for Salaries. See OFFICERS, 8.

Secretary of State Must Audit Claims Presented. See OFFICERS, 4, 5, 9, 10.

Should not Pay Warrant for Doubtful Claim. See OFFICERS, 6.

STATUTE OF FRAUDS.

A parol agreement between two sureties on an official bond that one should be liable for one third, and the other for two thirds, of the penalty, in case of default by the principal, is an original undertaking, not within the statute of frauds.—*Rose v. Wollenberg*, 269.

STATUTES OF OREGON Construed in this Volume:

- 55, Farrell v. Oregon Gold Company, 464.
- 60, Subd. 3, Tillamook Dairy Association v. Schermerhorn, 308.
- 71, Wyatt v. Henderson, 52.
- 84, Wyatt v. Wyatt, 531.
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- 101, { Talbot v. Garretson, 256.
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4104,		Little Nestucca Road Company v. Tillamook County, 8.

STATUTES AND STATUTORY CONSTRUCTION.

APPROPRIATION OF TOLL ROADS—NOTICE.

1. The proceeding provided by section 3256 of Hill's Ann. Laws for appropriating to public use the property of a toll road company is a hostile one.—*Little Nestucca Road Company v. Tillamook County*, 2.

AMENDING PLEADINGS—APPEAL FROM JUSTICE'S COURT.

2. Under the statute of 1893, concerning procedure in justice's courts (Laws 1893, p. 38) an answer may be amended after appeal to the circuit court by adding an entirely new defense not before suggested, if the court considers that justice will be thereby subserved.—*Meyer v. Edwards*, 23.

LEGISLATIVE CONSTRUCTION.

3. Where a statute has for many years, and from almost the date of its enactment, been construed by successive legislatures in a particular manner not inconsistent with the language used, the courts will hesitate to adopt a different construction.—*Shalluck v. Kincaid*, 379.

MEANING OF WORD "FUND" IN SECTION 2206, HILL'S ANN. LAWS.

4. The word "fund" as used in section 2206 of Hill's Ann. Laws means one of the original funds subsisting by law.—*Shalluck v. Kincaid*, 379.

SPECIAL APPROPRIATION.

5. The expression "where provisions for the payment thereof shall have been made by law," used in section 2230, Hill's Ann. Laws, refers to only those obligations incurred by the state under some previous authority, and does not include special appropriations made for particular purposes by acts which within themselves authorize the incurring of the expense.—*Shalluck v. Kincaid*, 380.

CLAIMS AGAINST STATE—APPROPRIATIONS FOR PAYMENT.

6. Hill's Ann. Laws, § 3877, providing that all accounts for supplies for the penitentiary shall specify the items, be certified by the superintendent, and presented to the secretary of state, who shall audit the same, and issue warrants on the treasurer for their payment, etc., does not make an appropriation for the payment of the class of claims referred to, in view of article IX, section 4, of the state constitution, forbidding payments of money from the state treasury except in pursuance of appropriations made by law. The long continued construction of this provision has been that a legislative appropriation is referred to.—*Crossman v. Kincaid*, 445.

LIABILITY OF SURETIES ON GENERAL AND SPECIAL OFFICIAL BONDS.

7. Where additional duties are imposed on a public officer, and he is required to give a bond particularly conditioned for their faithful performance, the sureties on his general bond are not liable for any delinquency in the performance of such new obligation. Within this rule the sureties on a sheriff's general bond, given under section 2392 of Hill's Ann. Laws, for the faithful performance of his duties, and the payment of all moneys coming to him by virtue of his office, are not liable for his failure to account for moneys received by him as tax collector; an additional bond covering his duties as such collector being required by section 2794 of said Laws.—*Columbia County v. Massie*, 292.

STATUTES AND STATUTORY CONSTRUCTION—CONCLUDED.

REPEAL OF STATUTE—INSURANCE.

8. Sections 8 and 9 of the law of 1864, requiring foreign insurance companies doing business in Oregon to execute and record a power of attorney in each county where they should have resident agents (Laws 1864, p. 745, Hill's Ann. Laws, § 3276), were impliedly repealed by the statute of 1887 on the same subject (Laws 1887, p. 118, Hill's Ann. Laws, §§ 3563-3586). This latter statute prescribed in detail the conditions under which foreign insurance companies might be admitted into this state, and is plainly a substitute for the prior law so far as it refers to appointing a person on whom service of summons may be made.—*Continental Insurance Company v. Riegen*, 336.

FOREIGN INSURANCE COMPANIES.

9. The requirements of section 3580, Hill's Ann. Laws, as amended (Laws 1889, p. 64), that every foreign fire and marine insurance company doing business in this state shall have one head office in the state under the charge of a general agent, is not a condition precedent to the right of such company to do business in this state, and a failure to comply therewith will not render void and unenforceable a contract of such company made while carrying on business here under a license regularly issued by the insurance commissioner, although it might afford some ground for a proceeding by the state.—*Continental Insurance Company v. Riegen*, 337.

REPEAL BY IMPLICATION—FENCE STATUTES.

10. The act of 1872, relating to trespass by horses and cattle and to fencing lands in Umatilla and Wasco counties (which, as amended, now constitutes Hill's Ann. Laws, §§ 3452-3456), is a complete substitute for the prior act of 1870, on the same subject (which, as amended, is now known as Hill's Ann. Laws, §§ 3445-3451) as to the territory then comprised within Wasco County. The common law on the subject of trespass by stock, except as to horses and cattle, is now in force in that district, within which is Gilliam County.—*Strickland v. Geide*, 373.

TRESPASS BY SHEEP.

11. The act of 1872 (Hill's Ann. Laws, §§ 3452-3456), as applied to sheep within what was then Wasco county, entirely superseded the act of 1870 (Hill's Ann. Laws, §§ 3445-3451), and it is, therefore, not now necessary to show the existence of a lawful enclosure before damages can be recovered for trespass by sheep.—*Strickland v. Geide*, 373.

LINCOLN COUNTY—FEES OF OFFICERS—STATUTES—CONSTRUCTION.

12. The act of 1893, creating Lincoln County (Laws 1893, p. 66), provides that the sheriff of the county "shall receive the same fees as are now allowed by law to the sheriff * * * of Benton County." The general salary law (Laws 1896, p. 163), enacted two days later, provides that the sheriff of Benton County shall receive an annual salary of \$2,000. *Held*, that the first law was not affected by the subsequent enactment; said former law contemplating that the sheriff of Lincoln County shall receive the same compensation as the sheriff of Benton County for like services under the fee system, and not that their aggregate annual compensation shall be the same.—*Landis v. Lincoln County*, 424.

SPECIAL AND LOCAL LAWS ON TAXATION.

13. The law of 1893, fixing the salaries of the sheriffs in all the counties but one in Oregon (Laws 1893, p. 183), is not void because it is a local or special law in respect to salaries; the generality of application required by article IV, § 23, subdivision 10, of the constitution, refers to the assessment and collection of taxes, not to the fees and salaries of public officers.—*Landis v. Lincoln County*, 424.

EQUITY JURISDICTION—STATUTORY CONSTRUCTION.

14. The right to prosecute in a court of equity a creditor's bill to uncover assets fraudulently conveyed, and to compel an accounting, was not superseded by the garnishment and attachment laws, since a legislative intention that it should be so superseded does not appear, and in the absence of such intent the jurisdiction of equity is not abrogated by the creation of a new legal remedy.—*Sabin v. Anderson*, 487; *Mullock v. Budd*, 516.

STATUTORY CONSTRUCTION.

15. When a constitutional provision prevents a statute from applying to certain persons or in certain cases where it apparently was intended to apply, the courts will not declare the statute unconstitutional but will hold that it was not intended to apply to such persons or cases.—*Northrup v. Hoyt*, 324.

STOCK—Trespass by, in Gilliam County. See TRESPASS.

STOCK KILLING.

Liability of Railroad — Place of Entry — Fences. See RAILROADS, 1.

SUMMONS.

MANNER OF SERVICE ON FOREIGN CORPORATIONS.

1. In the absence of special provisions relating to service of process on foreign corporations, jurisdiction is obtained over them in like manner as over domestic corporations. — *Farrell v. Oregon Gold Company*, 463.

SERVICE ON PRESIDENT OF FOREIGN CORPORATION.

2. A foreign corporation doing business in Oregon is subject to its laws, and hence, as there is no special law relative to service upon it, a service upon its president is prima facie sufficient, under section 55, Hill's Ann. Laws, though the return does not show he was authorized to represent the corporation. — *Farrell v. Oregon Gold Company*, 463.

SERVICE ON FOREIGN CORPORATIONS — RETURN ON PROCESS.

3. Under Hill's Ann. Laws, § 55, subdivision 1, the service of a summons on the president of a private corporation, either foreign or domestic, within the county where the cause of action arose, will confer jurisdiction on local courts, regardless of whether that officer either resides or has an office within such county, for the president is "an agent" of his corporation within the meaning of the last part of said subdivision. — *Farrell v. Oregon Gold Company*, 464.

4. It is not necessary to the validity of a default judgment rendered against a foreign corporation that the return of the service of summons shall show that the defendant was at the time engaged in business in this state. — *Furrell v. Oregon Gold Company*, 463.

SUPPLEMENTARY PROCEEDINGS

Not Equivalent of Creditor's Suit in Equity. See CREDITOR'S SUIT, 4.

SUPREME COURT.

Practice in Equity Cases — Defense not Presented. See COURTS, 5.

Costs of Mandate After Long Delay Should be Paid. See COURTS, 6.

Equity Cases Are Tried Anew on Appeal. See COURTS, 7.

SURETIES.

PAROL AGREEMENT AS TO RELATIVE LIABILITY — STATUTE OF FRAUDS.

1. A contract between cosureties fixing the proportion and extent of their several or correlative liability as between themselves is not within the statute of frauds. — *Rose v. Wollenberg*, 269.

LIABILITY ON OFFICIAL BONDS.

2. Where additional duties are imposed on a public officer, and he is required to give a bond particularly conditioned for their faithful performance, the sureties on his general bond are not liable for any delinquency in the performance of such new obligation. — *Columbia County v. Massie*, 292.

GENERAL AND SPECIAL BONDS.

3. Under the laws of Oregon in force in the year 1895, the general bonds of sheriffs and the special bonds required of them as tax collectors were not cumulative, but were independent bonds intended to secure the faithful performance of separate and distinct duties; from which it follows that the sureties on one of such bonds were not liable for any default in the performance of the duties for which the other bond was given. — *Columbia County v. Massie*, 292.

SURPRISE

As Ground for Relief Against Judgment. See JUDGMENTS, 3.

TAXES AND TAXATION.

CONSTITUTIONAL EQUALITY.

1. The generality of application required by article IV, section 23, subdivision 10, of the state constitution refers to the assessment and collection of taxes, not to the fees and salaries of public officials. — *Landis v. Lincoln County*, 421.

IMPLIED POWER OF MUNICIPAL TAXATION.

2. Power to levy a special tax cannot be implied from a clause in a municipal charter fixing a limit to the rate of taxation which is in excess of the rate conferred for general municipal purposes. — *Corbett v. City of Portland*, 407.

TAXES AND TAXATION—CONCLUDED.

RIGHT OF MUNICIPALITIES TO TAX.

3. The right of taxation can be exercised by a city only in the manner and to the extent defined by its charter, and a tax must always be supported by an express or necessarily implied grant of power.—*Corbett v. City of Portland*, 407.

CORRECTION OF ASSESSMENT ROLL BY COUNTY COURT.

4. The county court has no power to correct an assessment roll by striking therefrom certain lands as exempt from taxation, under Hill's Ann. Laws, § 2782, providing that the county court shall have power to correct the assessment roll, make necessary alterations in the description of land or other property, and make any other alterations or corrections in such roll as it deems necessary to make the same conform to the requirements of the chapter.—*Portland University v. Multnomah County*, 498.

CORRECTION OF ROLL BY BOARD OF EQUALIZATION.

5. The board of equalization has no power to strike from the assessment roll certain land as exempt from taxation, under Hill's Ann. Laws, §§ 2778, 2779, authorizing such board to increase or reduce valuations, correct the assessment of property if assessed more than once or in the name of one who is not the owner, and to add to the roll property omitted by the assessor.—*Portland University v. Multnomah County*, 498.

ACTION OF ASSESSOR NOT CONCLUSIVE.

6. The fact that the assessor has listed property for taxation is not conclusive that it is subject to taxation, but the question of exemption may be tried in some appropriate proceeding.—*Portland University v. Multnomah County*, 498.

APPORTIONMENT OF MONEY TO TAX FUNDS.

7. The word "moneys" as used in section 2818, Hill's Ann. Laws, referring to the payment of state taxes by counties, means all funds raised by taxation except the specific taxes.—*Northrup v. Hoyt*, 524.

TENDER.

While it is a rule that if a defrauded party elects to rescind a sale or other contract on which something has been paid he must return the consideration received, and must also repudiate the entire contract, yet the time and manner of the tender will depend somewhat on the kind of proceeding adopted. If the suit is in equity it is enough that on the final accounting the plaintiff gives up any consideration he may still have and stands charged with what he may have expended.—*Crosen v. Murphy*, 114.

TOLL ROADS.

Seizure for Public Highway—Compensation. See HIGHWAYS, 1, 2.

TRANSCRIPTS.

Papers that are not part of the judgment roll as defined by statute are not part of the transcript and will not be considered on appeal.—*Farrell v. Oregon Gold Company*, 464.

TREASURER.

Should Refuse Payment of Doubtful Claim. See OFFICERS, 6.

TRESPASS.

FENCES AGAINST STOCK—DAMAGES.

1. The common law on the subject of trespass by stock, except horses and cattle, is now in force in all the territory that was in 1872 within Umatilla and Wasco counties, which includes Gilliam County.—*Strickland v. Gelde*, 378.

TRESPASS BY SHEEP.

2. Since 1872 it has not been necessary to show that land was lawfully enclosed before damages could be recovered for trespass thereon by sheep within what was then Wasco County.—*Strickland v. Gelde*, 378.

TRIAL.

PROVINCE OF JURY—QUESTION OF FACT.

1. Where different deductions may reasonably be drawn from testimony the matter should be left to the jury.—*Richmond v. McNeill*, 342.

TRIAL—CONCLUDED.

RAILROAD FIRE—NEGLECTENCE—NONSUIT.

2. A plaintiff in an action against a railroad company for damages to land caused by fire which spread from combustible material negligently left along the company's right of way and ignited by a passing locomotive, cannot be charged with such negligence as will support a nonsuit, when his servant who was in charge of the property went with reasonable diligence to the scene of the fire, and made some effort to perform his duty, the degree of which is a question of fact for the jury. — *Richmond v. McNeill*, 842.

AMENDMENT AFTER MOTION FOR NONSUIT.

3. Permitting an amendment of a complaint by alleging an insurable interest in plaintiff's assignor at the time of a loss is not affecting any substantial right of the plaintiff in an action on a fire insurance policy, but is clearly a wise exercise of judicial discretion in the matter of amendments. Under section 101, Hill's Ann. Laws, such an amendment may properly be made after a motion for a nonsuit. — *Koshland v. Fire Association*, 868.

ALLEGATIONS AND PROOF—FINDINGS.

4. A decree must always follow the issues made by the pleadings, and if it is based on irrelevant evidence or on extraneous issues it cannot be upheld. — *Goldsmith v. Ewert*, 539.

TRUSTS AND TRUSTEES.

NOTES—LIABILITY OF TRUSTEE.

1. One who signs a promissory note "as trustee of" another is prima facie personally liable. — *Ogden Railway Company v. Wright*, 156.

LIEN ON INSOLVENT ESTATE FOR TRUST FUNDS.

2. In order to impress upon the assets of an insolvent estate a lien for trust funds, "must appear either that the identical fund is still among the assets awaiting distribution, or that the property sought to be subjected to the lien includes such funds or their proceeds; thus, where a receiver was appointed for an insolvent bank pendente lite, the funds ordered to be distributed were not called for by certain creditors, and on dismissal of the suit, were returned to the bank and expended by it in the usual course of its business, and the bank itself afterwards declared to her dividends in favor of the same creditors, which were not claimed, and were also expended, all such dividends lost their identity as trust funds and did not pass to a subsequent receiver of the bank as particular funds. — *Rockwell v. Portland Savings Bank*, 481.

FRAUDULENT GRANTEE IS A TRUSTEE FOR CREDITORS.

3. A banker who, with knowledge of a debtor's insolvency, accepts from him sundry notes, nominally for collection, but issues a negotiable certificate of deposit for their face, with a secret agreement that the certificate shall not be transferred, and then clandestinely buys it in at a discount, is a trustee of the funds collected and is personally liable therefor to the judgment creditors of such debtor. — *Sabin v. Anderson*, 487.

UMATILLA COUNTY.

Trespass by Stock, Cattle and Sheep—Fences. See TRESPASS.

VACATING JUDGMENT.

Failure of Trial Judge to Sign Bill of Exceptions. See JUDGMENTS, 2.

VENDOR AND PURCHASER.

A father who accepts from his daughter, with notice, a bill of sale covering property that belonged to her husband, and which had been leased to a third party in her name for the purpose of defrauding the husband's creditors, is not a bona fide purchaser when the only consideration was board for herself and child and money already advanced for incidental expenses. — *Perkins v. McCullough*, 69.

WAGES

Preferential Claim for is Assignable. See LABOR CLAIMS, 1.

Of Receiver's Employees—Mortgagee not Liable for. See LABOR CLAIMS, 2.

WARRANTS.

Warrant not Conclusive Evidence of Debt. See MUNICIPAL CORPORATIONS, 4.

County Warrant not Conclusive on the County. See COUNTIES, 7, 8.

WARRANTS—CONCLUDED.

State Warrant not Conclusive on the State. See *STATE*, 4.

Auditing of Claim Includes Drawing of Warrant. See *STATE*, 8.

Holder of City Warrant not Limited to Mandamus. See *MUNIC. CORP.*, 5.

Partial Payments Cannot be Compelled. See *MUNICIPAL CORPORATIONS*, 7.

WARRANTY

Of Ownership—Insurance Policy—Breach. See *INSURANCE*, 1.

WASCO COUNTY.

Trespass by Horses, Cattle and Sheep—Damages—Fences. See *TRESPASS*.

WATERS AND WATER RIGHTS.**LOSS OF APPROPRIATION—REASONABLE DILIGENCE.**

1. A landowner who makes an actual diversion of a certain quantity of water, and gives notice of an intended appropriation of a specific amount, is entitled to a reasonable time within which to make an actual application of all his intended appropriation to the contemplated useful purpose, but where he fails to use reasonable diligence, under the circumstances, for the accomplishment of such purpose he loses his initiative or inchoate appropriation, or so much thereof as he fails to utilize.—*Smyth v. Neal*, 106.

INSUFFICIENCY OF EXOPPEL.

2. Plaintiff, by making favorable representations to defendant of the desirability of his neighborhood for settlement, and by discussing methods for irrigation, and stating that he thought the water supply from the creek was sufficient for them both, and making no objection to his use of water therefrom, is not estopped to claim a superior right to so much of the water as prior to and during such time he had been using for beneficial purposes to the knowledge of defendant.—*Smyth v. Neal*, 106.

WATER RIGHT AN APPURTENANCE.

3. The right to water for irrigation, when appurtenant to land, passes by a grant of the land, though not specially mentioned.—*Turner v. Cole*, 154.

NONUSER—ABANDONMENT.

4. The mere nonuser for a single season of an appurtenant water right does not constitute an abandonment. One of the essentials of that result is an intention to relinquish, which is not shown in this case.—*Turner v. Cole*, 154.

WIFE.

Liability of Husband to Support his Wife.—See *HUSBAND AND WIFE*.

WORDS AND PHRASES.**"APPROPRIATION" DEFINED.**

An "appropriation" is a setting aside or designation of particular funds for the discharge of certain definite and specified obligations, and may relate to a fixed amount of liability or to one that is continuing.—*Shattuck v. Kincaid*, 379.

"CITIZEN" AS APPLIED TO FOREIGN CORPORATION.

A company incorporated in one state only, and doing business in another state in compliance with conditions imposed upon foreign corporations as prerequisites to their doing business therein, is neither a citizen nor a resident of the latter state, within the meaning of the act of March 3, 1887 (24 United States Statutes, 562), § 2, as amended and corrected by act of August 13, 1888 (25 United States Statutes, 488), providing for the removal of causes on the ground of nonresidence.—*Koshland v. National Insurance Company*, 206.

"DISCRETION OF COURT" DEFINED.

The discretion vested in the trial court by the statute is not a right to be arbitrary, but is rather a duty to decide certain questions in conformity with the spirit of the law, and in a manner to advance substantial justice.—*Thompson v. Connell*, 281.

"EXCUSABLE NEGLECT" RESULTING IN A JUDGMENT.

A judgment entered in violation of an agreement extending the time to answer is one taken through defendant's "surprise or excusable neglect," within the meaning of section 102, Hill's Ann. Laws, authorizing the court, in its discretion, to relieve a party from such a judgment.—*Thompson v. Connell*, 281.

WORDS AND PHRASES—CONCLUDED.

"FEES."

The word "fees," as used ordinarily in the Statutes of Oregon, signifies compensation or remuneration for particular acts or services rendered by public officers in the line of their duties to be paid by the parties benefited, or at whose instance they were performed, though there are exceptions to this use.—*Landis v. Lincoln County*, p. 427 (*Arguendo*).

"FUND" IN SECTION 2208, HILL'S ANN. LAWS.

The word "fund" as used in section 2208 of Hill's Ann. Laws means one of the original funds subsisting by law.—*Shattuck v. Kincaid*, 379.

"MONEYS" IN SECTION 2812, HILL'S ANN. LAWS.

The "moneys" referred to in section 2812, Hill's Ann. Laws, requiring county treasurers to pay over to the state treasurer in gold and silver coin the amount of state taxes charged to their respective counties out of the first "such" moneys collected and paid in to them, means not only the proceeds of the tax levied for state purposes but also the proceeds of the taxes for general county purposes. That expression, however, does not include the result of any taxes levied for specific purposes,—such as schools or roads.—*Northrup v. Hoyt*, 524.

"RESIDENT"—RIGHT OF FOREIGN CORPORATIONS TO REMOVE.

A company incorporated in one state only, and doing business in another state under the laws thereof, is neither a citizen nor a resident of the latter state, within the meaning of the removal acts of congress.—*Koshland v. National Insurance Company*, 206.

"SALARY."

The word "Salary" usually denotes a recompense or consideration to be paid a public officer for continuous, as distinguished from particular, services, and may be denominated "Annual or periodical wages or pay." Sometimes the words "Salary" and "Wages" are considered synonymous, but "Salary" and "Fees" are not.—*Landis v. Lincoln County*, p. 427 (*Arguendo*).

"SURPRISE" RESULTING IN A JUDGMENT. Same as EXCUSABLE NEGLIGENCE.

21 Or.—45.

Ex. C. 12.

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